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No. 07-

In The

Supreme Court of The United States

HENK ROMMY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented for Review

1. Whether venue must be proven beyond a reasonable doubt?

2. In a conspiracy case in which the government's only proof of venue is a defendant's telephone call with a person in the District, must the government prove the defendant knew he was speaking with someone in the District?

3. Whether a treaty that excludes evidence obtained beyond that in an approved request also excludes evidence obtained despite a request being denied?

Parties to the Proceeding in the Court of Appeals

The appellant was Henk Orlando Rommy while the appellee was the United States of America.

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2. *United States v. Rommy*, 2005 U.S. Dist. LEXIS 15163 (S.D.N.Y. July 25, 2005), 02 Cr. 994 (JSR)

Constitutional Provisions, Statutes and Regulations Involved in the Case

Constitutional Provisions

Art. III, § 2, cl. 3
The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State

where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Amendment VI
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Federal Rules of Criminal Procedure

Fed. R. Crim. P. 18
Place of Prosecution and Trial
Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant and the witnesses, and the prompt administration of justice.

Treaties

Treaty on Mutual Assistance in Criminal Matters, June 12, 1981, U.S.-Neth., 35 U.S.T. 1361, T.I.A.S. No. 10,734 (text at App. 78a)

IN THE SUPREME COURT OF THE UNITED STATES

HENK ROMMY,

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Henk Rommy, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered November 5, 2007.

Richard D. Willstatter and Theodore S. Green were retained to represent Mr. Rommy in the United States Circuit Court of Appeals.

Opinion below and Jurisdiction

On November 5, 2007, the Court of Appeals entered a published opinion (Docket No. 06-0520-cr) affirming the judgment of conviction rendered against Henk Rommy, in the United States District Court for the Southern District of New York. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254, subd. 1.

Statement of the Case

This petition seeks review of an order of the United States Court of Appeals for the Second Circuit which affirmed a judgment of the United States District Court, Southern District of New York, entered January 27, 2006, imposing a sentence of twenty years' imprisonment to be followed by a 3-year term of supervised release, a special assessment of $100 and a forfeiture judgment of one million dollars. Petitioner is serving the sentence.

Henk Rommy was convicted, after a jury trial, of conspiracy to import narcotics into the United States in violation of 21 U.S.C. §§ 952(a), 963.

Mr. Rommy, a Dutch national, was indicted in the Southern District of New York in July 2002. He was arrested while traveling in Spain in November 2003 and extradited to the United States by air, arriving at John F. Kennedy airport (in the Eastern District of New York) in early 2005 whereupon he was brought to the Southern District of New York to be tried. Rommy was charged with one count of conspiracy to import MDMA (or "Ecstasy") into the Southern District of New York.

The Mutual Legal Assistance Treaty

The United States and the Netherlands are parties to a Mutual Legal Assistance Treaty ("MLAT") which requires permission of the Requested government in order to receive assistance in investigating criminal matters. Treaty on Mutual Assistance in Criminal Matters, June 12, 1981, U.S.-Neth., 35 U.S.T. 1361, T.I.A.S. No. 10,734. (App. 78a) The treaty is self-executing. On April 12, 2000, the United States submitted a request for legal assistance to the government of the Netherlands. This request sought permission to conduct undercover operations and to tape telephone calls in the Netherlands in order to prosecute Rommy. Dutch law required a warrant for the use of undercover operations, confidential informants and the recording of telephone conversations. The MLAT request sought authorization to use the confidential source named Alexander Van der Laan De Vries ("Alex") in an undercover capacity, to conduct audio and video surveillance of meetings between Alex and Rommy and to conduct wire intercepts on Rommy's cellular phones and any other telephone numbers that might be identified as a result of the investigation. On November 19, 2000, the DEA noted in an internal memorandum that the Dutch Attorney General had disapproved this MLAT request. Nonetheless, from October 2001 through March 2003, the DEA secretly violated the treaty by using its informant, Alex, to speak to Rommy in the Netherlands. Some of these conversations appear to have been initiated from the United States, while others appear to have been initiated by Alex from Spain, Morocco and the Netherlands. The government produced 32 audiotape recordings made by the DEA of conversations among Alex, Rommy and others. Rommy was repeatedly taped while in the Netherlands; the government would later acknowledge that it obtained "consensually recorded calls" and reports of "DEA monitoring of unrecorded calls" of Rommy in the Netherlands. Alex and an undercover DEA agent initiated numerous investigative contacts with Rommy, including telephone conversations and a meeting in Bermuda.

On September 12, 2002, the government filed a separate MLAT request which merely sought information from the Dutch government, to wit: "information, official reports, and evidence, including recordings of wire and cellular interceptions of [] ROMMY and [] co-conspirators . . . [and also] any information that will assist identifying co-conspirators." This request did not seek permission to use a confidential informant to contact Rommy in the Netherlands or to tape his telephone conversations. This latter MLAT request was not granted until March 2005.

Rommy filed a pretrial motion to exclude evidence obtained without compliance with the treaty and Dutch law. The district court denied the motion without a hearing. The court found, *inter alia* that Rommy lacked standing under the MLAT Treaty to assert a right to exclude or suppress evidence the government obtained by using a confidential informant and employing video and audio surveillance, all without MLAT authorization. (App. 76a-77a)

During the litigation of pre-trial motions, the government revealed only that it had made and renewed its request to the Dutch government for information and the date when the information was provided. The government had, until that time, concealed the fact that the Dutch government had rejected its earlier MLAT request for permission to conduct investigative operations. This fact came to light at trial, prompting the defense to renew its motion to exclude evidence based on the government's deliberate violation of the MLAT treaty. The renewed motion was denied.

The MLAT treaty confers a right of suppression or exclusion of evidence as to evidence "obtained under this Treaty" or "information derived therefrom" as against an attempt by the requesting state to use such evidence "for purposes other than those stated in the request, without the prior consent of the Requested State." Article 11, para. 2 of the treaty, provides:

> The Requesting State shall not use any evidence obtained under this Treaty, nor any information derived therefrom, for purposes other than those stated in the request, without the prior consent of the Requested State.

While the MLAT treaty generally permits the parties to employ "procedure[s] available" under their "domestic laws," Article 18, subsec. 1, that provision is trumped by the more specific provision in Article 11, subsec. 2. barring "use" of "any evidence" that is "derived" from activities carried out without the consent of the Netherlands.
The MLAT provides:

> Except where this Treaty specifically sets forth rules for the admissibility of evidence, the provisions of this Treaty shall not give rise to a right on the part of any person to take any action in a criminal proceeding to suppress or exclude any evidence. This Treaty does not expand or limit rights to judicial review otherwise available under domestic law. Article 18, subsec. 2.

The MLAT goes on to set forth rules excluding evidence obtained under the treaty and information derived therefrom "for purposes other than those stated in the request" unless there is consent of the Requested State. Article 11, subsec. 2.

Trial Evidence

The evidence at trial included evidence obtained through the use of the confidential informant, including conversations Alex initiated or facilitated with Rommy and with an undercover DEA Agent, Grey. Through the use its informant, the government tricked Rommy into traveling to Bermuda for a meeting with Grey. At a meeting in Bermuda, Rommy agreed to help arrange for MDMA to be shipped inside a car through an unnamed, regularly operating New York area port. The defendant never took any steps whatever to pursue this illegal end and his conversations with the agent and informant did not constitute a conspiracy as one cannot conspire with a government agent. In any event, the evidence showed that Grey purported to live in New Jersey ("just across the [Hudson] river"), that Grey was working with a man who intended to sell the MDMA pills on "the Jersey shore" and that Grey wanted Rommy to make arrangements for someone in New York or New Jersey to give him $10,000. Grey presented himself as someone whose primary contacts were in New Jersey.[1] In fact, the Port Authority of New York and New Jersey operates no ports whatever in the

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[1] The government suggested that since Alex once spoke to Rommy while Alex said he was visiting the site of the World Trade Center in Manhattan, this was proof that Rommy believed Grey was in Manhattan even though Grey did not participate in that call. This proof was insubstantial compared to Grey's"Jersey" ties.

Southern District of New York.[2] In fact, the only port facility "dedicated exclusively to the movement of vehicle imports and exports" is the Auto Marine Terminal located in Port Newark, New Jersey. See www.panynj.gov/DoingBusinessWith/seaport/html/automarine.html. (last visited Jan. 31, 2008)

There was trial evidence from two cooperators, Bosch and Rinaldi, who had been convicted of possession of MDMA in Florida state court but who also cooperated with a DEA investigation in Florida. Although Rinaldi had told the DEA Task Force in Florida that she had no information linking Rommy to the MDMA in Florida, at trial she testified that a co-conspirator told her that Rommy had financed one-half the MDMA shipment. Neither Bosch nor Rinaldi gave evidence of an act in furtherance of the conspiracy in the Southern District of New York. Although they testified that Rommy had once contracted with them while in Europe to bring one million MDMA pills to New York, that purported deal was not consummated.

The government sought to prove venue in the Southern District of New York by claiming Rommy had made calls in furtherance of the conspiracy into the District. This claim was hotly disputed at trial. The calls in question were said to have been initiated by Rommy in Holland to Grey in New York, but the first portions of the conversations were mysteriously missing from the tape recordings.

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[2] The port facilities are in Brooklyn (Brooklyn Marine Terminal and Red Hook Container Terminal), Staten Island (Howland Hook Marine Terminal), and New Jersey (Auto Marine Terminal, Global Marine Terminal, Port Newark and Elizabeth Marine Terminal). Brooklyn and Staten Island are within the Eastern District of New York.

On September 18, 2002, there was a telephone call between Rommy in the Netherlands and Alex's cell phone at a time when Alex, by extraordinary coincidence, happened to be with DEA Agent Christopher Urben at the United States Attorney's office in Manhattan. The agent claimed that Rommy had called Alex's phone. The agent testified that he hooked up a recording device to this call as it was commencing. Because the opening telephone greetings are not recorded, one cannot tell whether it was an incoming or outgoing call nor did the government offer any cell phone records to show which party originated the call. The defense contended that the call was initiated by Alex, not Rommy. This September 18, 2002 conversation concerned an attempt to set up a meeting with Rommy in Spain.

Subsequent to that call, Agents Grey and Urben traveled to Spain in an attempt to meet with Rommy, who did not show up for the meeting. Thereafter, upon their return from Spain, the agents said they directed Alex to furnish a cellular telephone number to Rommy. This number belonged to a DEA cell phone that Grey claimed he kept in his possession in case Rommy called, with the intention of recording any such call. On October 17, 2002, Grey, while at his office, claimed to have received a call on that telephone from a male caller. According to Grey, in an unrecorded part of the conversation, the caller identified himself as Alex's friend, apologized for not meeting the agent in Spain and expressed interest in doing business. Grey claimed he could not record this beginning part of the conversation because, when the phone rang, he was wandering around the DEA office away from his desk and it took some time for him to get to his recording equipment. Moreover, Grey claimed he could not recall whether his cell phone was equipped with a caller-ID feature. As a result, Grey claimed, he could not document that this was an incoming call, as opposed to a call that he initiated. Alex was in the Netherlands with Rommy during this call. At the beginning of the recorded portion of this conversation, Agent Grey makes a show of telling Alex to "put him back on dude" to which Alex, uncomprehendingly replies "What?" During the ensuring conversation, Grey tries to arrange a meeting with Rommy.

Earlier that day, the same team of agents recorded a call in Holland which began by Alex first placing a call to the agents in New York, after which the agents "patched" that call to Rommy, making it appear to Rommy that he was receiving a call from Alex in the Netherlands when, in fact, the call was being routed through New York. During the call, Alex asked Rommy to come over to Alex's home that day to meet him. The defense argued that the agents planned for Alex to lure Rommy to Alex's home so that Alex could call into the DEA in New York or receive a call from Agent Grey and then put Rommy on the phone with Grey.

After follow-up conversations in February and March 2003 – initiated, respectively, by Alex and Agent Grey – Alex and Agent Grey traveled to Bermuda where Rommy was staying with his wife and young daughter at a resort hotel. In Bermuda, Alex and Agent Grey spoke with Rommy at a hotel-room meeting that was audio and video recorded. The parties discussed a proposed importation of MDMA pills into the United States concealed in an automobile, with Grey helping to clear the shipment through the United States ports. At one point, Rommy is quoted saying, "I know people that looking for a way to get it in," which Agent Grey, over objection, was permitted to testify that he understood to refer to "[p]eople in his [Rommy's] organization looking to get ecstasy pills into New York." When Grey remarked that he would not be responsible for "getting rid" of the pills, Rommy is quoted saying "no, no, no, they do everything themselves. Hey. You get the money. Hey, they take the things and give you the money." However, Grey later said he wished to be compensated by taking possession of one-third of the imported pills.

On the recording, however, Rommy makes a number of remarks evidencing a disinclination to do business in the United States or a lack of direct knowledge of operations in the United States, including:

> "Not for myself, I know. But I know people that want to do something in America. But me, I'm afraid. I'm really afraid."
>
> "I'm, I'm not involved. You know? I only know people that used to bring stuff to New York, you know?"
>
> "but I know America's big market. I don't know the cost. I don't really know nothing really. I'm telling the truth, but I know people."
>
> "I know people, boys in Holland that make a lot of money. I don't do it."

During the meeting, Rommy agreed to try to arrange the delivery of 300,000 MDMA pills to a New York area port with the assistance of the undercover agent and Alex. However, after the Bermuda meeting, Rommy never took any steps whatever to put this plan into action. There was no evidence he contacted anyone for this purpose or took any other steps to advance this plan.

Counsel argued that Grey lied and that the calls were initiated either by him or by Alex who then exhorted Rommy to speak into the phone. No cell phone records were introduced at trial. The defense argued that the government had improperly attempted to manufacture venue in the District by creating false evidence to suggest Rommy had called into the District when, in fact, the Agent had called him.

The Jury Instructions

The trial court denied the defendant's request that the burden of proof be beyond a reasonable doubt. After hearing an objection by the defense, the district judge denied the government's request for an instruction that calls either from or to the District would suffice to prove venue. Instead, the judge gave the jury an example, that is, that a call by the defendant into the district would create venue if its substance was in furtherance of the conspiracy:

> It is not necessary that the government prove that all or even most of the conspiracy was carried out in the Southern District of New York. Rather, it is sufficient if you find by a preponderance of the evidence that any act in furtherance of the conspiracy occurred at least in part in the Southern District of New York. For example, if you find by a preponderance of the evidence that after the alleged conspiracy was formed, a telephone call in furtherance of the conspiracy was made to a location in the Southern District

> of New York, that would be sufficient to fulfill that venue requirement, even if the call was made to an undercover agent or some other nonconspirator.

During deliberations, the jury asked whether venue was created if Grey was the one who initiated the call to Rommy: "Can venue be proved by an outgoing call; in other words, if special agent Grey made a call out to Henk Rommy on October 17, does that constitute venue?"

The defense argued that if the call was initiated by Grey, there could be no venue and, in any event, the defendant in such an instance would have to know he was speaking to Grey while Grey was in the District. The trial court ruled that knowledge of a conspirator that he is acting in a particular District is not necessary for venue purposes. Over objection, the trial court instructed the jury that a call by Grey to Rommy could prove venue if the conversation was in furtherance of the conspiracy. The court ruled that the jury would not even need to find that the defendant knew the agent was in New York when the call was placed. The defense requested a charge that if the agent called the defendant to manufacture jurisdiction in the Southern District of New York, that would be insufficient to establish venue but this request was denied. The court charged:

> Now, a third party can initiate a call, it doesn't have to be a co-conspirator, obviously Special Agent Grey was not a co-conspirator; on the other hand, a call that is initiated by someone who is not a co-conspirator would not count unless it was a call that in some fashion

> was either induced by the ongoing conspiracy or in some way furthered the ongoing conspiracy. If it met those requirements, it would constitute venue; if it didn't meet those requirements, it could not constitute venue.

A guilty verdict followed.

The Court of Appeals' Decision

The Second Circuit panel held that venue did not need to be proven beyond a reasonable doubt. The panel found that when the government seeks to establish venue in a conspiracy case and the evidence of venue is limited to telephone calls with the defendant, the government need not prove he knew he was speaking (in furtherance of the conspiracy) to someone in the district. The Court of Appeals found, instead, that the government need only prove that it was reasonably foreseeable to the defendant that he might be speaking with someone in the district. The panel declared that the trial court's failure to charge reasonable foreseeability was plainly harmless. (App. 21a-38a)

Regarding the defendant's argument that evidence obtained in violation of the treaty should have been excluded, the panel found that the treaty did not provide for such exclusion. The Court of Appeals found that the treaty's exclusion of evidence for purposes other than those sought in an approved MLAT request did not exclude evidence obtained after the flat denial of such a request. (App. 43a-49a)

REASONS FOR GRANTING THE WRIT

POINT I

Venue Is an Element of Any Offense and must Be Proven Beyond a Reasonable Doubt

The requirement of proper venue may be the only constitutional protection mentioned in the body of the original Constitution, in the Bill of Rights, and in the Declaration of Independence. The founding fathers sought to protect people from oppressive government prosecutions in distant locations. The venue provisions they enshrined in our Constitution were intended to protect defendants against the unfairness and hardship of prosecution in places remote from their homes. *United States v. Cores*, 356 U.S. 405, 407, 2 L. Ed. 2d 873, 78 S. Ct. 875 (1958).

"Proper venue in criminal proceedings was a matter of concern to the Nation's founders. Their complaints against the King of Great Britain, listed in the Declaration of Independence, included his transportation of colonists 'beyond Seas to be tried.'" *United States v. Cabrales,* 524 U.S. 1, 5 (1998). Petitioner was transported across the Atlantic Ocean to be tried in a country in which he had never previously set foot. Questions of venue "raise deep issues of public policy in the light of which legislation must be construed." *United States v. Johnson,* 323 U.S. 273, 276 (1944). Article III of the Constitution requires that "the Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed." Art. III, § 2, cl. 3. Its command is reinforced by the Sixth Amendment's requirement that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." *United States v. Rodriguez-Moreno,* 526 U.S. 275, 278 (1999). Rule 18 of the Federal Rules of Criminal Procedure likewise provides: "Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed." Fed. R. Crim. P. 18.

To establish venue in a conspiracy case, the government must prove that the unlawful agreement was reached in the district. "[V]enue is proper in any district in which an overt act in furtherance of the conspiracy was committed[.]" *Whitfield v. United States,* 543 U.S. 209, 218, 125 S. Ct. 687, 693 (2005)("For a conspiracy prosecution under the common law rule, the district in which the unlawful agreement was reached would satisfy this default venue rule.") An overt act by a co-conspirator in the district would also suffice to prove venue in a conspiracy case. *Cabrales,* 524 U.S. at 9 citing *Hyde v. United States,* 225 U.S. 347, 363, 32 S. Ct. 793 (1890).

There is no doubt whatever that when the government charges a man such as Mr. Rommy with a specific crime, conspiracy to import drugs into the United States, and where the indictment alleges that the crime took place in a specific district, the government is obligated to prove venue in that district. The government has conceded that it must prove venue but argues that venue is a "non-element" and thereby avoid the requirement of proof beyond a reasonable doubt. This is pure sophistry. If the government must prove a fact to sustain a conviction, the constitution requires it be proven beyond a reasonable doubt. All argument to the contrary is unavailing if the constitutional requirements as enunciated by this Court are binding.

In this case, venue was disputed. Henk Rommy was never in the district. There was no evidence whatever of any act in furtherance of the alleged conspiracy in the district save the voice of the defendant on the telephone from the Netherlands. There was evidence to support the defendant's argument that he had not called into the district and did not know whether the agent with whom he spoke was there during the conversations. The court of appeals brushed aside these arguments. With a higher burden of proof, an acquittal was a reasonable possibility.

Recently, in the *Booker* case, this Court wrote:

> It has been settled throughout our history that the Constitution protects every criminal defendant "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). It is equally clear that the "Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." *United States v. Gaudin*, 515 U.S. 506, 511, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995).These basic precepts, firmly rooted in the common law, have provided the basis for recent decisions interpreting modern criminal statutes and sentencing procedures.

United States v. Booker, 125 S. Ct. 738, 748 (2005). *Compare United States v. Perez*, 280 F.3d 318, 330 (3rd Cir. 2002)(describing venue as an element) *with United States v.*

Maldonado–Rivera, 922 F.2d 934, 969 (2d Cir. 1990) ("venue however is not an element of the offense"). Whether such a factual determination is called an "element" or not, the Constitution requires proof of such facts beyond a reasonable doubt.

In *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), this Court affirmed that any fact that must be proven at trial is an element and, hence, must be proven beyond a reasonable doubt:

> Our decision in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), clarified what constitutes an "element" of an offense for purposes of the Sixth Amendment's jury-trial guarantee. Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact -- no matter how the State labels it -- constitutes an element, and must be found by a jury beyond a reasonable doubt. *Id.*, at 482-484, 490.

537 U.S. at 111. In sum, it does not matter how the courts (or the states) label a fact that must be proven. *Any fact* that must be proven is covered by the Sixth Amendment right to a jury trial and its corresponding burden of proof. Since a defendant cannot be convicted without sufficient proof of venue to a jury's satisfaction, proof of an act in furtherance of a conspiracy in the district is a fact which must be proven beyond a reasonable doubt.

There is a split among the Circuit Courts as to whether venue is an element of the offense. Some circuit describe venue as an "element" but think it need not be proven beyond a reasonable doubt. *See United States v. Perez*, 280 F.3d 318 (3d Cir. 2002)(venue is an element but does not automatically present a jury question); *United States v. Johnson*, 2007 U.S. App. LEXIS 28914 (4th Cir. Va. Dec. 14, 2007)(venue is similar in nature to a jurisdictional element); *United States v. Carreon-Palacio*, 267 F.3d 381, 390 (5th Cir. 2001)("Venue only constitutes an "element" of an offense in the narrow context of what must be proven in order for a conviction to pass constitutional muster"); *United States v. Stickle*, 454 F.3d 1265, 1271 (11th Cir. 2006)("[W]hen the government is proving a non-essential element of a crime, like venue, the prosecution is not required to meet the reasonable doubt standard."); *United States v. Haire*, 362 U.S. App. D.C. 10, 371 F.3d 833, 839 (D.C. Cir. 2004)(same), vacated on other grounds, 543 U.S. 1109 (2005).

Other circuits, such as the Second Circuit, as set forth in the opinion below, do not characterize venue as an element at all. *See United States v. Muhammad*, 502 F.3d 646, 656 (7th Cir. 2007); *United States v. Casch*, 448 F.3d 1115 (9th Cir. 2006)("Venue is not an element of the charged crime, but establishment of venue is part of the prosecution's burden").

All of the Courts of Appeal acknowledge that proof of venue is required at least where it is disputed but strain to avoid the obvious: because its factual basis must be proven, it must be proven beyond a reasonable doubt. This Court should finally resolve the issue.

POINT II

Where the Only Proof of Venue Are Telephone Conversations by an Overseas Defendant and an Agent, the Government must Prove the Defendant Knew He Was Speaking with Someone in the District.

"[T]he venue requirement is principally a protection for the defendant." *Cabrales*, 524 U.S. at 9. This Court has recognized that a cautious interpretive approach is "more consonant with the considerations of historic experience and policy which underlie [the venue] safeguards in the Constitution." *Johnson*, 323 U.S. at 275. A defendant may be deemed "constructively present" in a district when his co-conspirator commits an overt act there, *Hyde v. United States*, 225 U.S. at 362- 363, but at least one conspirator has to know he is acting in that district as when a corrupt Senator sends his agent to Missouri to accept a bribe there.

However, the Second Circuit has attempted to circumvent the constitutional requirements by establishing a "substantial contacts" test. If the crime in question had such contact, the circuit reasons, constitutional concerns melt away. This post-hoc rationalization for unconstitutional prosecutions should be rejected.

The Circuit established the notion of the need to examine a case for substantial contacts in *United States v. Reed*, 773 F.2d 477, 480-481 (2d Cir. 1985) and confirmed it in *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1200 (2d Cir. 1989), this time declaring the need for its use inasmuch as "the Supreme Court has not enumerated the precise policies underlying venue law[.]" *Accord, United States v. Saavedra*, 223 F.3d 85, 93 (2d Cir.

2000).[3]

In *United States v. Johnson*, 2007 U.S. App. LEXIS 28914 *16-17 (4th Cir. Va. Dec. 14, 2007), the Fourth Circuit rejected the need for any foreseeability in venue cases but noted a spilt among the circuits. The *Johnson* court found that venue was similar to "jurisdictional elements" which do not have *mens rea* requirements. *Id.*

In this case, the court of appeals conflated the object of the conspiracy with the requirement that an act in furtherance of the conspiracy take place in the district. The court below reasoned that since there was evidence that Rommy agreed with the agent and informant to bring MDMA to New York, it was unnecessary to prove that any conspirator entered into the unlawful agreement there.

It appears the requirement of reasonable foreseeability for venue is derived from conspiracy cases in which a conspirator acts in furtherance of the crime within a district without the defendant's knowledge. Courts seem to logically conclude that since an act in furtherance of the conspiracy took place in the district, venue is proven but are reluctant to find liability absent reasonable foreseeabiltity. From that proposition, the court of appeals took an even shakier step: now a defendant may not only be liable for another's act in the district in furtherance of a conspiracy without actual knowledge, he may also be liable for his own act without knowing he was committing the crime! The Circuit claims the crime was committed in any event but this is wrong. The crime charged in the indictment was the only crime for which Rommy was haled into court beyond Seas.

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[3] As noted by dissenting Judge Jose A. Cabranes in *Saavedra*, the *Reed* decision did not hold that substantial contacts ameliorate the constitutional concerns in venue cases. *Id.* at 99, n. 4.

The Circuit says it can ignore that the fact that New York contains two districts. It has also ignored the fact that the agent claimed he was from New Jersey, intended to distribute the drugs in New Jersey and that the New York Area ports are not located in the Southern District of New York. Here was a case in which there was evidence that the defendant (1) did not know he was speaking to the agent in the district and (2)had reason to believe the agent was in another district. In view of these facts, the Circuit Court calls upon its reasonable foresseability standard to rescue the government.

The Circuit's opinion opens people around the nation and even the world to be prosecuted in any federal district chosen by the government. *See Travis v. United States*, 364 U.S. 631, 634, 5 L. Ed. 2d 340, 81 S. Ct. 358 (1961) ("Venue provisions in Acts of Congress should not be so freely construed as to give the Government the choice of a 'tribunal favorable' to it."). Under this new rule of law, Agents can call or email anyone in the world and extradite them to any district without the target knowing the Agent is in the District even when there is no other act in furtherance of the conspiracy committed there.

Conspiracy charges lie on the frontier on venue cases, for the crime is committed by virtue of the agreement itself. "The law of venue as applied to conspiracy cases helps to mark the outer limits of venue in criminal cases." *United States v. Sang Jang*, 2007 U.S. Dist. LEXIS 95347 (S. D. Ind. Dec. 27, 2007). People can enter conspiracies by telephone or other form of electronic communication. But to prove the crime took place in the district, at least one of the conspirators has to knowingly do something in furtherance of the conspiracy in the district. If the Agent says, "hey, I'm here at my Wall Street office" when he speaks to the target, the target knows he is speaking to someone in the Southern District of New York. But if the agent says he is from New Jersey but is actually in Manhattan when he calls the defendant, proof of knowledge is lacking; a conviction in such circumstances cannot pass constitutional muster by virtue of the venue provisions. The crime of conspiracy is not committed in a district unless at least one of the conspirators knows he is acting there.

Point III

Where a Treaty Creates an Obligation Not to Use Any Evidence Thereby Obtained for Any Purpose Other than That Consented to by the Requested State, the Requesting State May Not Then Use Evidence Obtained Despite a Denial of a Request for It.

Article VI, the Supremacy Clause of the Constitution, declares that treaties, like the Constitution and laws "shall be the supreme Law of the Land." Ratified treaties have the same force of law as statues. "By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other." *Reid v. Covert*, 354 U.S. 1, 18, n. 34 (1957), *quoting Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

The Treaty at issue provides that the Requested State may deny the request if, among other reasons, "the request would prejudice the security or other essential public interests of the Requested State." MLAT, Art. 10, subsec. (1)(a). The only place in the Treaty which refers to the exclusion of evidence is Article 11, in which the Treaty provides that the Requesting State shall not use any evidence obtained under this Treaty for any purpose other than those stated in the request without the consent of the Requested State. MLAT, Art. 11, subsec. 2. In Article 18, the Treaty provides that except where the Treaty specifically sets for rules on admissibility of evidence, there shall be no right to suppress or exclude evidence. MLAT, Art. 18, subsec. 2. If this last section did not refer to the exclusion of evidence not in conformity with an approved request, what purpose would it have? The Treaty envisions that a person who is aggrieved by a Requesting State's use of evidence for some purpose other than that approved in a request may suppress or exclude that evidence.

The Court of Appeals' limited the meaning of the Treaty's exclusion of evidence to only those circumstances in which evidence received from an approved MLAT request is sought to be used for some purpose other than was approved. Yet, it is obvious that the Treaty permits a Requested State to deny or refuse a request. If a request for evidence is denied, there is by definition no consent to its use for any purpose. The Treaty does not envision that denied MLAT requests will result in secret, undercover operations without the consent of the Requested State.

Since the two countries intended that evidence would be used only if its disclosure was permitted by approved request and not for some unapproved purpose, it follows that evidence obtained in violation of the Treaty is excluded *a fortiori*. One may not do by indirection what one cannot do directly. *Anderson v. Martin*, 375 U.S. 399, 404

(1964)("that which cannot be done by express statutory prohibition cannot be done by indirection"). The Court of Appeals opinion in this regard is too clever by half.

The Circuit Court cited *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) as though it precluded an exclusionary rule in every treaty-based claim. But that is a misreading of the case. The Court simply found that a specific Treaty, the Vienna Convention, did not provide for exclusion of evidence. *Id.* at 2678. But the MLAT Treaty with the Netherlands does indeed provide for a limited right to exclusion of evidence when it is used for a purpose other than that approved in the request.

Henk Rommy's government denied the United States government's request to conduct undercover operations, consensual recordings and wiretapping. The U.S. government proceeded to use an informant and an undercover officer and to make recordings of conversations in the Netherlands. Other evidence was derived from these meetings and recordings, including the meeting in Bermuda. The defendant moved to suppress evidence because it appeared no MLAT had been approved. The government hid from the defense and the trial court the fact that an MLAT had been denied and that operations were conducted in violation of Dutch law and the Treaty. The American authorities orchestrated a series of operations in the Netherlands in defiance of that Nation's denial of an MLAT request and in violation of domestic Dutch law. The Treaty provides that the Requesting State cannot use evidence for any purpose not approved by the Requested State. Accordingly, if the Requested State approves *nothing* then no operations are permitted and any evidence derived therefrom must be excluded. The Circuit in effect ruled that when the Requesting State conducts operations in violation of a complete denial of a request for assistance, no remedy of exclusion lies, whereas that remedy is available where a request is granted but its scope is exceeded. This absurd result defeats the clear purpose and intent of the Treaty.[4]

Because the Treaty is entitled to the full force of law in the United States, Rommy had standing to suppress or exclude the evidence obtained without the consent of his government.

In this increasingly "flat" world, the Courts of the United States will be called upon to mediate greater numbers of cases in which U.S. law enforcement operations are conducted overseas. The conduct of such operations may be governed by valid Treaties to the extent they are consistent with our Constitution. The Court should therefore clarify that merely because one Treaty did not provide for the exclusion of evidence, another Treaty could and its provisions may not be ignored.

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[4] Indeed, the Treaty provided that requests for legal assistance must be executed according to the law of the Requested State. MLAT, Art. 12, subsec. 2. The Netherlands' Special Powers of Investigation Act prohibited covert operations absent a warrant issued by a public prosecutor, required pre-approval by a magistrate for recording confidential communications, and required a written agreement before a confident informant could be used.

CONCLUSION

For the reasons stated above, petitioner respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

Theodore S. Green

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Dated: February 4, 2008

APPENDIX

MANDATE

United States Court of Appeals
FOR THE
SECOND CIRCUIT
JUDGMENT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 5th day of November, two thousand seven

Before: Hon. Dennis Jacobs,
Chief Judge,
Hon. John M. Walker, Jr.,
Hon. Reena Raggi,
Circuit Judges.

Docket No. 06-0520-cr

UNITED STATES OF AMERICA,
Appellee,

v.

HENK ROMMY
Defendant-Appellant.,

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the

Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is hereby ORDERED, ADJUDGED and DECREED that judgment of said District Court be and hereby is AFFIRMED in accordance with the opinion of this Court.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE,
Clerk by Administrative Attorney

Joy Fallek
Joy Fallek

A TRUE COPY
Catherine O'Hagan Wolfe, Clerk
by
DEPUTY CLERK

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2006
(Argued: November 28, 2006
Decided: November 5, 2007)

Docket No. 06-0520-cr

UNITED STATES OF AMERICA,
Appellee,

—V.—

HENK ROMMY,

Defendant-Appellant.

Before:
JACOBS, *Chief Judge*, WALKER, and RAGGI,
Circuit Judges.

Appeal from a judgment of conviction entered in the United States District Court for the Southern District of New York on a single count of conspiracy to import "ecstasy" into the United States in violation of 21 U.S.C. §§ 952(a), 963. Rommy contends that the district court erred (1) in instructing the jury that venue in the Southern District of New York could be established by a telephone call placed by an undercover agent in that district to Rommy in the Netherlands; and (2) in admitting evidence obtained in violation of the mutual legal assistance treaty in effect between the United States and the Netherlands, as well as various provisions of the Constitution and the Federal Rules of Evidence.

AFFIRMED.

RICHARD D. WILLSTATTER, Green & Willstatter, White Plains, New York, *for Defendant-Appellant*.

KEVIN R. PUVALOWSKI, Assistant United States Attorney (Scott L. Marrah, Assistant United States Attorney, *on the brief*), for Michael J. Garcia, United States Attorney for the Southern District of New York, New York, New York, *for Appellee*.

REENA RAGGI, *Circuit Judge*:

Defendant Henk Rommy appeals from a judgment of conviction entered on January 27, 2006, in the United States District Court for the Southern District of New York (Jed S. Rakoff, *Judge*), following a jury trial at which he was found guilty on one count of conspiracy to import methylenedioxymethamphetamine, commonly known as "MD MA" or "ecstasy," into the United States in violation of 21 U.S.C. §§ 952(a), 963. Presently incarcerated serving a twenty-year sentence, Rommy challenges his conviction on the grounds that the district court erred (1) in charging the jury that venue in the Southern District of New York could be established by a telephone call placed by an undercover agent in that district to Rommy in the Netherlands; and (2) in admitting evidence obtained in violation of the mutual legal assistance treaty in effect between the United States and the Netherlands, as well as various provisions of the Constitution and the Federal Rules of Evidence. Because we conclude that the alleged errors are either without merit or, in any event, harmless, we affirm the judgment of conviction.

I. Factual Background

From at least 1980, Dutch national Henk Rommy, also known as the "Cobra," headed an international drug ring that trafficked in large quantities of controlled substances. The trial evidence establishing Rommy's guilt included the testimony of co-conspirators, recorded conversations between Rommy and both a government informant and an undercover agent of the Drug Enforcement Administration ("DEA"), and statements volunteered by Rommy to federal agents with whom he asked to speak while incarcerated in Spain pending extradition to the United States.

A. Co-conspirator Testimony

1. Background Evidence as to Rommy 's European Drug Trafficking

Thomas Bosch, a Swiss banker turned drug trafficker, testified that, in the late 1980s and continuing for more than a decade thereafter, he and confederate Jack Zuchetto smuggled hundreds of kilograms of hashish from Rommy in the Netherlands to buyers in Switzerland.[1] In or about 2000. Bosch learned from Zuchetto that Rommy was experiencing problems smuggling ecstasy pills into Switzerland and that he sought their assistance in transporting a 100,000 pill shipment from the Netherlands to Zurich. Bosch testified that the pills in question were light blue in color and stamped with the logo of the late Italian fashion designer Gianni Versace. After successfully completing this delivery, Bosch helped smuggle two more shipments of ecstasy pills into Switzerland for Rommy.

2. Rommy Recruits Bosch to Smuggle Ecstasy into the United States

In 2000, Rommy also asked Bosch to smuggle one million ecstasy pills into the United States. Bosch explained that he had acquired some familiarity with transporting drugs into this country because, in the three preceding years, he and his fiancée, Daniela Rinaldi, had smuggled approximately 120 kilograms of hashish and marijuana into the United States, concealing the drugs in recreational vehicles shipped from Europe. Rommy told Bosch that he wanted the ecstasy imported into New York. When Bosch expressed a preference for Miami as the port of entry, Rommy agreed, advising Bosch that his New York contacts could travel to Miami to pick up the shipment. Eventually, Bosch and Rommy decided that half the pill shipment would be given to Rommy's New York confederates while Bosch would transport the remainder into Mexico for sale in that country. Bosch would convert the proceeds from the ecstasy shipment into cocaine for delivery to Rommy in Europe. In return, Rommy would pay Bosch one dollar per pill successfully smuggled, for an anticipated total of $1 million.

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[1] Although Bosch's testimony about dealing drugs with Rommy in Europe was quite detailed, we here provide only a brief summary as background to the events supporting the charged conspiracy.

When, in late 2000, it came time to execute the million-pill shipment, Bosch could not locate Rommy. In fact, Rommy had been arrested by Dutch authorities in connection with an unrelated investigation into his drug activities. He remained incarcerated from November 2000 until May 2001.

3. Rommy's Involvement in the Allen/Bosch/Rinaldi Shipment

______In 2000, Bosch and Rinaldi successfully smuggled a load of ecstasy into the United States for a different Dutch trafficker named Redouan. Redouan arranged for the drugs to be sold in Miami by Thomas Allen. Upon the successful completion of this scheme, Bosch, Rinaldi, and Allen decided to team up to import another ecstasy shipment totaling 800,000 pills into the United States in 2001. As Bosch and Rinaldi each testified, Allen agreed to procure the pills in the Netherlands and to be financially responsible for half the shipment; Bosch and Rinaldi agreed to transport the pills into the United States and to be financially responsible for the remaining half.

After the 800,000 ecstasy pills were successfully smuggled into Miami, Allen told Rinaldi that Allen's half of the shipment had to be sold first because it belonged to the "Cobra" (i.e., Rommy), who wanted his money right away. In fact, Allen did sell his half of the shipment; meanwhile Bosch and Rinaldi were arrested by Florida authorities in possession of the remaining 400,000 pills.

B. The DEA Undercover Investigation

1. Dutch Authorities Alert DEA Agents to Rommy's Interest in Smuggling Ecstasy into the United States

In early 2000, at the same time that Rommy was plotting with Bosch, Rinaldi, and Allen to smuggle ecstasy pills into the United States, Dutch authorities contacted DEA agents stationed in the Netherlands to advise them that a confidential informant, Alexander Van der Laan DeVries ("DeVries"), had been approached by Rommy to transport ecstasy to New York City.[2] After debriefing DeVries, the DEA decided to use him to introduce Rommy to an undercover agent, Mark Grey, whose purported criminal connections at New York ports would allow him to smuggle ecstasy into New York cached in vintage cars.

2. The Treaty Requests for Dutch Assistance

To facilitate this plan, in April 2000, pursuant to a mutual legal assistance treaty then in effect between the United States and the Netherlands, see Treaty on Mutual Assistance in Criminal Matters, June 12, 1981, U.S.-Neth., 35 U.S.T. 1361, T.I.A.S. No. 10,734 ("MLAT"), the United States formally requested Dutch authorization to employ various investigative techniques in the Netherlands. Specifically, the United States sought to use DeVries in an undercover capacity and, pursuant thereto, to make audio or video recordings in the Netherlands of conversations between the confidential informant and Rommy. Authorization was also requested for United States officials to wiretap Rommy's telephone in the Netherlands. Dutch authorities denied the April 2000 request.

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[2] Because DeVries did not testify at trial, the jury heard no specific evidence about this initial recruitment.

A second MLAT request from the United States, in September 2002, sought access to evidence and witnesses developed by Dutch authorities in the course of their investigations into Rommy's criminal activities. In granting this request, the Netherlands provided the United States with a transcript of an October 30, 2000 telephone call intercepted by the Dutch police in which Rommy and an unnamed confederate discussed the limited supplies of "Versace t-shirts." At trial, the government would use Bosch's testimony about ecstasy pills stamped with the Versace logo to argue that this conversation related to drugs. See infra at **[59-60]**.

3. The Recorded Telephone Calls

Despite the denial of the initial MLAT request, United States authorities proceeded with their plan to use DeVries in an undercover investigation of Rommy, but they conducted no electronic monitoring in the Netherlands. Instead, between October 2001 and March 2003, DEA agents working in Manhattan recorded five telephone calls in which Rommy, DeVries and Agent Grey engaged in thinly veiled discussions about smuggling ecstasy into New York. Because the location of the parties and the initiator of the calls are issues relevant to the venue argument on appeal, we duly note these facts.

It is undisputed that the first recorded call was placed by DeVries in Manhattan to Rommy in the Netherlands on October 20, 2001. In that conversation, DeVries not only told Rommy that he was in New York City, he specifically reported that he was standing near the site of the recently destroyed World Trade Center. With respect to the smuggling plan, Rommy asked DeVries if his "friend" (Agent Grey) was going "to look at the car." Telephone Tr. Oct. 20, 2001, at 1. When DeVries replied that this had already been done, Rommy inquired, "Do you think he can sell it, do you think?" Id. DeVries assured Rommy of his friend's ability to do what was necessary, and advised that he (DeVries) would be back in the Netherlands the following week.

It would be almost a year before the next recorded call on September 17, 2002. On that date, DeVries was again in Manhattan meeting with federal agents at the United States Attorney's Office. According to the agent who recorded this call, Rommy, who was then in the Netherlands, placed the call to the informant's cell phone. At trial, Rommy's counsel disputed his client's initiation of the call, an argument made possible by the fact that the recording of the start of the call was inaudible. In the ensuing conversation, DeVries reported that he was "going to come to Spain with Mark [i.e., Agent Grey)." Telephone Tr. Sept. 17, 2002, at 2. Rommy stated that he would meet the men there. The Spain meeting, scheduled for October 4, 2002, never took place because, from October 2-4, Rommy was once again detained by Dutch authorities conducting an unrelated investigation.

A third recorded telephone call occurred on October 17. 2002. Agent Grey testified that, on that date, while in his Manhattan office, he received an unexpected call on an undercover telephone from Rommy and DeVries who were then together in the Netherlands. Because it took Grey a few moments to attach a recording device to the telephone, the initial part of the conversation was not recorded. Grey testified, however, that the first voice he heard on the line was Rommy's, who introduced himself as "Alex's friend" and who apologized for missing the meeting in Spain. Trial Tr. 61. The defense challenged this account, arguing that DeVries placed the call because his was the first voice recorded speaking with Grey. The government disputed this contention, noting that, within moments, Grey asked DeVries to "put him [i.e., Rommy] back on." Telephone Tr. Oct. 17, 2002, at 2 (emphasis added). In the course of this conversation, Rommy stated that he was "famous in Holland," to which Grey replied that he was not interested in fame, just in "do[ing] some business together." Id. at 3. Rommy told Grey, "don't worry. I see you soon." Id.

______It was undisputed that the fourth and fifth recorded calls were placed by Agent: Grey in Manhattan to Rommy in the Netherlands. In the fourth call, on February 25, 2003, for which DeVries was present with Rommy, the three men planned a meeting. In agreeing to the proposed schedule, Rommy stated, "Ok, no problem. I can do a lot of things." Telephone Tr. Feb. 25, 2003, at 3. In the final recorded telephone conversation on March 14, 2003, Rommy was initially distracted, explaining, "I have a lot of problems. Somebody must pay me some money, about, ah, $240,000." Telephone Tr. Mar. 14, 2003, at 2. Soon thereafter, however, Rommy confirmed that he would meet with Grey the following week.

4. The Videotaped Meeting in Bermuda

On March 23, 2003, Rommy met with Agent Grey and DeVri es at a hotel in Bermuda to finalize a deal to import 300,000 ecstasy pills into New York City. In a videotaped meeting lasting more than an hour, Rommy provided the most compelling evidence of his own guilt. Speaking openly of his experience in narcotics trafficking generally and ecstasy trafficking in particular, Rommy explained that ecstasy pills were made from special oils produced in China. According to Rommy, two liters of the oil could yield 8,000 ecstasy pills for a total cost of $2,500; those 8,000 pills, in turn, could command $150,000 on the open market. Rommy stated that he had "friends" who could get 2,000-3,000 liters of the oil per year, Videotape Tr. Mar. 23, 2003, at 48, and he bragged of his connections with Dutch drug laboratories that "make the best stuff," id. at 50.

Agent Grey represented to Rommy that his contacts at the ports in New York would allow him to get drug-laden cars through customs without inspection. Grey nevertheless told Rommy that, once he got the ecstasy pills into the United States, he did not want to be responsible for their disposal. Rommy assured Grey that he already had people in New York City ready to accept the ecstasy shipment, and that these individuals would pay Grey in "cash right away" upon delivery. Id. at 37. When Grey indicated a preference to be paid in pills, Rommy agreed to give

Grey one-third of the shipment — 100,000 out of a total of 300,000 pills — as a transportation fee.

C. Rommy's Prison Interview in Spain

Following the Bermuda meeting, United States authorities made an international request for Rommy's provisional arrest. On November 12, 2003, Spanish authorities, acting on this request, took Rommy into custody and detained him in a Madrid prison. While extradition proceedings were pending. Rommy, through his girlfriend Laura de Vreeze, requested a meeting with DEA representatives in Spain. At the time, Rommy had been represented for more than eight months in the extradition proceedings by two Spanish attorneys.

In response, DEA Special Agent John Fernandez, accompanied by a DEA intelligence analyst, an inspector from the Spanish police, and Ms. de Vreeze, met with Rommy in the Madrid prison on August 26, 2004.[3] At no time during this meeting was Rommy advised that he had rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), or asked for an explicit waiver of those rights. Instead, after introducing himself, Agent Fernandez asked Rommy why he had requested a meeting. Rommy replied that he was facing extradition to the United States where he knew that penalties for drug trafficking were more severe than in Europe. He had sought a meeting to proffer his cooperation to the DEA "in setting up other traffickers that he knew, in exchange for leniency at sentencing." Trial Tr. 556. Agent Fernandez told Rommy that he could not promise any leniency because Rommy's immediate fate lay in the hands of Spanish authorities and, even if he were extradited to the United States for prosecution, leniency "was ultimately the decision of a judge." Id. Agent Fernandez then offered to end the meeting, but Rommy stated that he still wished to go forward and provide information.

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[3] At the time of this meeting, Agent Fernandez had been working as a DEA country attache in Spain for less than a month, having previously been assigned to the agency's Los Angeles field office. Although Rommy was detained on the request of the United States, Fernandez asserted that, at the time of the Madrid prison meeting, he knew nothing about any DEA undercover investigation into Rommy's drug activities.

Rommy proceeded to speak at some length and in detail about areas of potential cooperation. He described himself as a well-known international drug broker whose nickname was the "Cobra." To confirm his notoriety, Rommy showed Agent Fernandez press clippings from Dutch newspapers that included his photo and reported on his criminal exploits. Rommy emphasized his ability to target very high-level traffickers and proceeded to disclose names and background information on more than a dozen such persons, including Bosch, Zuchetto, Allen, and DeVries. Rommy expressed confusion as to his own arrest, insisting that he had never sent ecstasy to the United States despite being pushed to do so by others, notably, DeVries. Rommy stated that DeVries had recently arranged a meeting in Bermuda where Rommy had spoken with a smuggler who could clear drugs into New York's ports. Unfamiliar with any of the persons or facts disclosed by Rommy — not even with the fact that the "smuggler" whom Rommy met in Bermuda was an undercover DEA agent — Fernandez simply took notes as Rommy spoke, interrupting the defendant only to ask follow- up questions that sought the spelling of names, the dates when recounted events occurred, and, on one occasion, a clarification as to a substance that Rommy referred to as "BMK," apparently an ingredient of ecstasy.

Several weeks later, Agent Fernandez and Rommy's lawyers discussed a possible second meeting. Fernandez reported that Rommy's lawyers were enthusiastic about such a meeting and expressed disappointment when it did not materialize.

D. Rommy's United States Prosecution

1. Indictment

Rommy was originally indicted by a grand jury in the Southern District of New York in July 2002, well before his provisional arrest in Spain. That initial indictment charged Rommy with one count of conspiracy to import ecstasy into the United States in violation of 21 U.S.C. §§ 952(a), 963. Two superseding indictments were filed in November and December 2003, expanding the time frame of the charged conspiracy and adding a forfeiture allegation.

2. Suppression Motions

After extradition to the United States and before trial, Rommy moved to suppress various evidence, including (1) the recorded telephone calls and the videotape of the Bermuda meeting, which he challenged as the fruits of an unlawful DEA undercover operation conducted in violation of the MLAT; and (2) the statements he made to the DEA while incarcerated in Spain pending extradition, which he claimed were procured in violation of the Fifth and Sixth Amendments. The district court denied these motions as without merit.

3. The Challenged Venue Charge

Rommy's trial commenced on September 20, 2005. The government introduced the extensive incriminating evidence already detailed. As was his right, Rommy offered no evidence. He did, however, move for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure based on the government's alleged failure to establish venue in the Southern District of New York. The district court denied the motion but pursued the venue question further with counsel at the charging conference.

Specifically, the district court rejected defendant's request to instruct the jury that venue in the Southern District of New York had to be proved beyond a reasonable doubt, charging instead that the government could carry its venue burden by a preponderance of the evidence. The district court further proposed to charge the jury— by way of example — that a telephone call made in furtherance of the conspiracy by a defendant outside the Southern District to a non-conspirator within the district could establish venue in the district. While acknowledging the existence of some cases indicating that even calls "going the other way," i.e., from a non-conspirator in the district to a defendant outside the district, might suffice, Trial Tr. 632, the court reserved judgment on that possibility: "I think I want to think a little hit more about this issue of the [outgoing] phone call," id. at 634. In the end, the issue was left unresolved, and the court charged the jury as follows with respect to venue:

> Finally, you must determine whether any action in furtherance of the alleged conspiracy occurred at least in part in the Southern District of New York. This is called "venue," and, un like all the other requirements, which must be proven beyond a reasonable doubt, the government is only required to prove venue by a preponderance of the evidence; that is, that it is more probable than not. [Court defines Southern District] It is not necessary that the government prove that all or even most of the conspiracy was carried out in the Southern District of New York. Rather. it is sufficient if you find by a preponderance of the evidence that any act in furtherance of the conspiracy occurred at least in part in the Southern District of New York. For example, if you find by a preponderance of the evidence that after the alleged conspiracy was formed, a telephone call in furtherance of the conspiracy was made to a location in the [district], that would be sufficient to fulfill the venue requirement, even if the call was made to an undercover agent or some other nonconspirator.

Id. at 748-49.

In the course of its deliberations, however, the jury itself raised the outgoing call issue, asking, "[C]an venue be proved by an outgoing call; in other words, if [S]pecial [A]gent Grey made a call out to Henk Rommy on October 17, does that constitute venue[?]" Id. at 773. Disclosing the inquiry to counsel, the district court observed, "So the issue that we have ducked has conic back and can no longer be ducked." Id. Rommy's counsel demurred, insisting that the outgoing call issue had already been decided in Rommy's favor, that counsel had relied on that decision in summation and that any response allowing the jury to base venue on an outgoing call would violate Federal Rule of Criminal Procedure 30(b), which requires the trial court to inform parties before summations of its rulings on requested instructions. The district court disagreed. It observed that it had given the jury "an example" of an incoming call supporting venue, but this was "not a definitive ruling excluding all other possibilities." Id. at 774. It concluded that venue could be established by an outgoing call from Agent Grey within the district to Rommy outside the district "if [the call] meets the other requirements for an act in furtherance of a conspiracy." Id. at 778. The court rejected defense counsel's argument that Rommy would "have to know that Agent Grey was in New York at the time" of the outgoing call for such a call to establish venue. Id. The court also denied Rommy's request to charge the jury further on the issue of manufactured venue,[4] finding that the issue was

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[4] Defense counsel requested that the district court "add some language" that "if the defendant was manipulated in calling this district" to "manufacture" venue, venue would be improper in the district. Trial Tr. 781.

"totally before [the jury]," and that the requested instruction was not responsive to the jury's particular inquiry. Id. at 780.

Following this colloquy, the district court responded to the jury's venue inquiry as follows:

> The first question is, can venue be proved by an outgoing call. The answer to that is yes, a call that originates in the Southern District of New York can go somewhere else if it meets the other requirements to support venue just like an incoming call. In the instructions I used an example of an incoming call, but an outgoing call that meets the requirements would also support venue in the Southern District of New York.
>
> The second question is, "In other words, if [S]pecial [A]gent Grey made a call out to Henk Rommy (10/17) does that constitute venue." The answer to that is it could. Remember, you have to find before you can find that any such call in either direction supports venue that, first, there was already a conspiracy formed and, second, that the call in some manner furthered the conspiracy.
>
> Now, a third party can initiate a call, it doesn't have to be a co-conspirator, obviously, [S]pecial [A]gent Grey was not a co-conspirator; on the other hand, a call that is initiated by someone who is not a

> co-conspirator would not count unless it was a call that in some fashion was either induced by the ongoing conspiracy or in some way furthered the ongoing conspiracy.
>
> Id. at 782-83.

On September 30, 2005, the jury returned a guilty verdict.

4. Sentencing

At sentencing, the district court found that Rommy had conspired to import at least 1.7 million ecstasy pills into the United States. This quantity included the aborted one- million pill agreement with Bosch and Rinaldi; the 400,000 pills that Rommy gave Thomas Allen as part of the 800,000 pill Allen/Bosch/Rinaldi shipment in 2001; and the 300,000 pills discussed with Grey and DeVries in Bermuda. With an offense level of 40 and a criminal history of V, Rommy's Sentencing Guidelines range provided for a prison term of 360 months to life. This range was, however, limited by the statutory maximum term of twenty years' incarceration. See 21 U.S.C. §§ 960(b)(3), 963.

Rejecting defense arguments for leniency, the district court sentenced Rommy to the maximum twenty-year prison term, observing that he was "a hardened, sophisticated, career criminal" who had organized "international drug deals whose scope and sophistication is outweighed only by their intrinsic value." Sentencing Tr. Jan. 17, 2006, at 21. In addition to twenty years' incarceration, the court sentenced

Rommy to three years' supervised release, a $100 special assessment, and a forfeiture judgment in the amount of $1 million.

Rommy timely appealed the judgment of conviction.

II. Discussion

A. Challenge to Venue Instructions

Rommy asserts that the district court's jury instructions as to venue were flawed in two respects: (1) in identifying the government's venue burden as a preponderance of the evidence rather than proof beyond a reasonable doubt, and (2) in allowing the jury to find venue in the Southern District of New York based on calls made by an undercover agent in Manhattan to defendant in the Netherlands. We review legal challenges to jury instructions de novo, and, even where we identify error, we will reverse a conviction "only if the charge, taken as a whole, was prejudicial." United States v. Gaines, 457 F.3d 238, 244 (2d Cir. 2006) (quoting United States v. Caban, 173 F.3d 89, 94 (2d Cir. 1999)); see United States v. Ford, 435 F.3d 204, 209-10 (2d Cir. 2006); see also United States v. Ramirez, 420 F.3d 134, 139 (2d Cir. 2005) (noting that questions of law pertaining to venue are reviewed de novo). In this case, we conclude that neither of defendant's challenges to the venue charge has merit.

1. The Preponderance Burden

Rommy's argument that venue must be proved beyond a reasonable doubt requires little discussion.

The government's burden to establish venue originates in two provisions of the Constitution. Article III, section 2, states, in relevant part, that criminal trials "shall be held in the State where the said Crimes shall have been committed." U.S. Const. art. III, § 2, el. 3. The Sixth Amendment further guarantees that a criminal defendant "shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." Id. amend. VI. In furtherance of these provisions, Rule 18 of the Federal Rules of Criminal Procedure requires that, "[u]nless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed." Fed. R. Crim. P. 18.

As this court has frequently observed, the venue requirement, despite its constitutional pedigree, "is not an element of a crime" so as to require proof beyond a reasonable doubt; rather, venue need be proved only "by a preponderance of the evidence." United States v. Ramirez, 420 F.3d at 139 (emphasis added); United States v. Chen, 378 F.3d 151, 159 (2d Cir. 2004); United States v. Svoboda, 347 F.3d 471, 485 (2d Cir. 2003); United States v. Bala, 236 F.3d 87, 95 (2d Cir. 2000); United States v. Smith, 198 F.3d 377, 382 (2d Cir.1999).[5] To the extent Rommy persists in arguing that venue is an element, his argument is convincingly refuted by the fact that the law treats objections to venue as waived "unless `specifically articulated' in defense counsel's motion for acquittal." United States v. Potamitis, 739 F.2d 784, 791 (2d Cir. 1984) (quoting United States v. Grammatikos, 633 F.2d 1013, 1022 (2d Cir. 1980)); accord United States v. Bala, 236 F.3d at 95.

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[5] Because venue is not an element of a crime, a question might be raised as to whether venue disputes must, in fact, be submitted to a jury. See United States v. Jenkins, 510 F.2d 495, 498 & n.4 (2d Cir. 1975) (noting issue without deciding it); see also United States v. Hart-Williams, 967 F. Supp. 73, 76-78 (E.D.N.Y. 1997) (concluding that venue need not be decided by jury), aff'd on other grounds, 129 F.3d 115 (Table), 1997 WL 701374 (2d Cir. Nov. 10,

Accordingly, we reject Rommy's burden challenge to the district court's venue instruction as meritless.

2. Basing Venue on the Site of a Government Actor's Outgoing Call to a Conspirator

Whatever burden applies to venue, Rommy submits that the district court's response to the jury's venue inquiry was flawed in three respects: (a) the court erred as a matter of law in instructing that telephone calls from a government actor in Manhattan to Rommy in the Netherlands could establish venue in the Southern District of New York; and, even if such calls could support venue, the instruction (b) ran afoul of Fed. R. Crim. P. 30(b) because it contradicted representations made to counsel at the charging conference; and (c) should have included a charge on "manufactured venue." We are not persuaded.

a. Telephone Calls in Furtherance of a Conspiracy Can Establish Venue Either Where Placed or Received

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1997). Since the question was not briefed in this case, we do not attempt to resolve it here.

(1) The Venue for Conspiracy

The venue requirement serves to shield a federal defendant from "the unfairness and hardship" of prosecution "in a remote place." United States v. Cores, 356 U.S. 405, 407 (1958). As the constitutional text makes plain, however, unfairness is generally not a concern when a defendant is tried in a district "wherein the crime shall have been committed." U.S. Const. amend. VI.

The site of a crime's commission is not always readily determined. The commission of some crimes can span several districts. In such circumstances, Congress has instructed that venue properly lies in "any district in which such offense was begun, continued, or completed." 18 U.S.C. § 3237(a); see United States v. Ramirez, 420 F.3d at 139. Applying this rule to the continuing crime of conspiracy, this court has held that venue may lie in any district in which the conspiracy was formed or in any district in which a conspirator committed an overt act in furtherance of the criminal scheme. See United States v. Geibel, 369 F.3d 682, 696 (2d Cir. 2004); United States v. Smith, 198 F.3d at 382; United States v. Ramirez-Amaya, 812 F.2d 813, 816 (2d Cir. 1987). Thus, a defendant need not himself have ever been physically present in a district for a conspiracy charge against him to be venued there. See United States v. Naranjo, 14 F.3d 145. 147 (2d Cir. 1994) (holding with respect to venue that conspiracy defendant "need not have been present in the district as long as an overt act in furtherance of the conspiracy occurred there").[6]

(2) Telephone Calls as Overt Acts

(a) Calls Between Conspirators

It is beyond question that telephone calls can constitute overt acts in furtherance of a conspiracy. See United States v. Smith, 198 F.3d at 382; United States v. Naranjo, 14 F.3d at 147; United States v. Friedman, 998 F.2d 53, 57 (2d Cir. 1993). In cases involving telephone calls between co-conspirators in different districts, we have ruled that venue lies "in either district as long as the calls further the conspiracy." United States v. Smith, 198 F.3d at 382. In such circumstances, the direction of the call is irrelevant to venue. Id. (noting that in United States v. Friedman, 998 F.2d at 57, where defendant in Long

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[6] Mindful of these principles, Rommy does not contend that he could not be prosecuted anywhere in the United States. Overt acts committed by co-conspirators Bosch, Rinaldi, and Allen in Miami would presumably have supported venue in the Southern District of Florida. Even if Rommy could argue that the charged conspiracy was committed, if at all, "out of the jurisdiction of any particular State or district," he would not escape federal prosecution because venue would then exist in the district to which he was "first brought" into the United States to answer the indictment. See 18 U.S.C. § 3238.

It appears that Rommy never moved for a change of venue to the Southern District of Florida or the district where he first entered the United States (if it was not the Southern District of New York), in all likelihood because such venues were no more convenient for this Dutch national than the Southern District of New York. See Fed. R. Crim. P. 21(b) (providing for transfer of venue "for the convenience of the parties and witnesses and in the interest of justice")

Island placed calls in furtherance of conspiracy to confederate in Manhattan, venue was established in the Southern District of New York, and concluding "[t]here is no reason why the opposite calling pattern should not also establish venue"): accord United States v. Kim, 246 F.3d 186, 193 n.5 (2d Cir. 2001) (observing that phone call "to or from" a district can establish venue in that district as to any member of conspiracy).

Rommy submits that the reasoning in these cases cannot support venue in a district from which a non-conspirator initiates a call to a conspirator outside the district. To the extent the conspirator uses such a telephone call to further the conspiracy, we disagree.

(b) Calls Between Conspirators and Non-Conspirators

(i) Calls Placed by Conspirators

When one of the participants in a telephone call is a non-conspirator, such as a government actor, we have already ruled that a call in furtherance of the conspiracy placed by a conspirator outside the district to a government actor within the district is sufficient to establish venue in the district with regard to any member of the conspiracy "at least in the absence of unfairness or hardship . . . arising from trial in that district, or artificial creation of venue in that district by the Government." United States v. Naranjo, 14 F.3d at 146 (holding that telephone call from conspirator in Eastern District of New York to undercover agent in Southern District of New York established venue in Southern District as to defendant who was member of conspiracy); see also United States v. Stewart, 878 F.2d 256, 258 (8th Cir. 1989) (upholding venue in North Dakota when Colorado defendant placed call to telephone in North Dakota that was programmed to forward calls to undercover agent in Minnesota). In light of this precedent, Rommy's own telephone calls from the Netherlands to government actors in Manhattan certainly support venue in the Southern District of New York.

(ii) Calls Placed by Government Actors

(a) The Conspirator's Use of Such a Call to Further the Conspiracy Renders It an Overt Act

On this appeal, however, we must consider whether the district court erred in allowing the jury to base its venue finding on a different scenario: telephone calls from government actors within the district to Romany in the Netherlands. Although this court has not previously considered whether such circumstances can establish venue in the district where the call was initiated, two of our sister circuits have answered that question in the affirmative.

In United States v. Cordero, 668 F.2d 32 (1st Cir. 1981), the First Circuit considered whether telephone calls from an undercover agent in the District of Puerto Rico to conspirators outside that district could establish venue in Puerto Rico to prosecute a conspiracy to import drugs into the island. In an opinion by then-Judge Breyer, the First Circuit ruled that such outgoing calls supported venue in Puerto Rico:

> Sorren and Cordero [the co-conspirators] spoke to Jimenez [the undercover agent] while he was in Puerto Rico and provided him with key information, which

> was then communicated to others. The fact that Jimenez placed the calls to Cordero and to Sorren who were outside the Commonwealth, does not change the fact that Corder() and Sorrcn transmitted this information through Jimenez who was inside Puerto Rico. Moreover, they knew he was in Puerto Rico and they knew the offense was bound for completion in Puerto Rico. It is not as if Jimenez were a traveler making chance use of a telephone at a bus stop. Thus, we think it highly likely that the offense was "continued" in Puerto Rico.

Id. at 44 (citations omitted).

In *Andrews v. United States*, 817 F.2d 1277 (7th Cir. 1987), an Illinois defendant was prosecuted in the Western District of Wisconsin for unlawfully using a telephone to facilitate cocaine distribution in violation of 21 U.S.C. § 843(b). The trial evidence showed that, while in Illinois, the defendant had received at least one telephone call from an undercover agent in the Western District of Wisconsin who indicated interest in buying cocaine. The Seventh Circuit upheld venue in Wisconsin, observing that "section 843(b) proscribes a continuing offense and, as a result, the crime is committed both where the call originates and where it is received." *Id.* at 1279. The Seventh Circuit noted that "it appears clear from the record that [defendant] knew that at least one phone call was from [Wisconsin]," but it reserved decision on "whether venue would be proper in Wisconsin without the defendant's knowledge that the call originated from there." Id. at 1280 n.2. In response to defendant's complaint that, "allowing venue to be determined by the origin of the call, when the defendant does not make the call. could lead to forum-shopping on the part of the government,- id. at 1279, the Seventh Circuit observed that there was no evidence of forum-shopping in the case before it. "To the extent that [forum-shopping] is a concern in a given case, it is more appropriately handled at the trial level by a transfer to a more reasonable forum, pursuant to Fed. R. Crim. P. 21." Id. at 1279-80.

We agree with the First and Seventh Circuits that a telephone call placed by a government actor within a district to a conspirator outside the district can establish venue within the district provided the conspirator uses the call to further the conspiracy. Indeed, we conclude that the critical factor in conspiracy venue analysis is not whether it is a conspirator or a government actor who initiates the call; nor does it matter whether the conspirator is communicating with someone who is a knowing confederate, an undercover agent, or an unwitting third-party. What is determinative of venue — as the district court emphasized to the jury — is whether the conspirator used the telephone call to further the objectives of the conspiracy. See United States v. Naranjo, 14 F.3d at 147 ("We see no basis for imposing any more rigorous requirement concerning the content of the phone calls than that they do further the conspiracy.").

When a conspirator uses a telephone call — by whomever initiated — to further a criminal scheme, the conspirator effectively propels not only his voice but the scheme itself beyond his own physical location into that of the person with whom he is speaking. See United States v. Johnson, 323 U.S. 273,275 (1944) (holding that venue may constitutionally lie in any area through which "force propelled by an offender operates"). In short, the conspirator avails himself of modern technology to commit at long distance the identical covert act that he would commit by being in the same room with a person and whispering a conspiracy-furthering message directly into his listener's car. In the latter circumstance, the conspirator's commission of an overt act does not depend on whether the listener rather than the conspirator initiates the conversation. Nor does it matter whether the listener is a confederate, an innocent third party, or an undercover agent. What matters is that the conspirator speaks, not to hear the sound of his own voice, but to communicate to his listener because he thinks that, by doing so, he furthers a conspiratorial goal. Thus, the overt act may properly be understood to have occurred at the site where the listener receives the conspirator's message. That an instrument of commerce or technology permits the conspirator to communicate with his listener while physically removed from him does not alter the fact that the conspirator has committed an overt act at the recipient's location. It means simply that his communication is a continuing act, supporting venue in the district of its initiation as well as the district of its receipt. As the Supreme Court recognized more than sixty years ago with respect to use of the mails, venue may constitutionally lie "in the district where [a defendant] sent the goods, or in the district of their arrival, or in any intervening district." Id.[7]

Accordingly, even with respect to telephone calls placed by non-conspirators to conspirators, we adhere to our precedent that the direction of the call is irrelevant to venue. Calls "to or from" a district can constitute overt acts sufficient to establish venue, provided that the conspirator uses the call to further the objectives of the conspiracy. United States v. Kim, 246 F.3d at 193 n.5 (emphasis added); see also United States v. Smith, 198 F.3d at 382; United States v. Naranjo, 14 F.3d at 147; United States v. Friedman, 998 F.2d at 57.

b) The Foreseeability of Venue

Rommy submits that, even if a call initiated by a government actor to a conspirator can support venue in the calling district, the district court erred in refusing to instruct the jury that the defendant had to know his caller's location. See United States v. Reed, 773 F.2d 477, 481 (2d Cir. 1985) (discussing fairness of venue in the "sense of having been freely chosen by [the defendant] as the place at which the [overt] acts were committed"); see also United States v. Ramirez, 420 F.3d at 143 (observing that "inquiry should not end with finding that venue properly lay" pursuant to statute; court should determine whether location of venue is constitutional)[8] Rommy notes that such knowledge was present in both Andrews and Cordero. See United States v. Andrews, 817 F.2d at 1280 n.2 (noting fact without deciding whether it was essential to venue); United States v. Cordero, 668 F.2d at 44.

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[7] In Johnson, the Supreme Court observed that various federal statutes sometimes place limitations on venue that might not be constitutionally required. See United States v. Johnson, 323 U.S. at 276-77 (comparing different statutes). No such statutory limits are at issue in this case.

Preliminarily, we observe that the law does not require a defendant to have actual knowledge that an overt act will occur in a particular district to support venue at that location. At most, it asks that the overt act's occurence in the district of venue have been reasonably foreseeable to a conspirator. See United States v. Rowe, 414 F. 3d 271, 279 (2d Cir. 2005) (holding that, in prosecution for electronically advertising to distribute child pornography in violation of 18 U.S.C. § 2251 (d), even though defendant posted advertisement from home in Kentucky, venue was proper in Southern District of New York because defendant "must have known or contemplated that the advertisement would be transmitted by computer to anyone the whole world over who logged onto the site" (internal quotation marks omitted));[9] United States v.S Svoboda, 347 F.3d at 483 (collecting cases with respect to foreseeability of venue). In this case, although the district court did not specifically instruct the jury as to the foreseeability of venue in the Southern District of NewYork, the evidence supporting that conclusion is so compelling that, if there was an error in that omission, it was plainly harmless. See generally Neder v. United States, 527 U.S. 1, 1016 (1999); California v. Roy, 519 U.S. 2, 5 (1996).[10]

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[8] As Ramirez explained, the constitutional inquiry focuses on "whether a given venue is 'unfair or prejudicial' to the defendant" as compared to some other venue to which the charged crime bears substantial contacts. 420 F.3d at 143 (quoting United States v. Saavedra, 223 F.3d 85, 93 (2d Cir. 2000) (discussing four factors generally indicative of substantial contacts: "(1) the site of the crime, (2) its elements and nature, (3) the place where the effect of the criminal conduct occurs, and (4) suitability of the venue chosen for accurate factfinding")). Because Rommy cannot show that being prosecuted in the Southern District of New York, as compared to some other United States venue (jurisdiction not being at issue in this case), "imposed an additional hardship on [him], prejudiced [him], or undermined the fairness of [his] trial," United States v. Saavedra, 223 F.3d at 94, no real constitutional venue concerns arise in this case. Nevertheless, to the extent knowledge or, more accurately, foreseeability, of where an overt act will occur can mitigate fairness concerns as to venue, we proceed to discuss why Rommy's challenge necessarily fails.

The first recorded telephone call of the investigation, placed by DeVries to Rommy on October 20, 2001, establishes Rommy's knowledge that he was being called from the Southern District of New York. In reporting to Rommy that he had successfully made contact with someone who could help them smuggle drugs, DeVries stated, "I am with my friend [i.e.,

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[9] Unlike Rowe, this case does not present novel issues of foreseeability arising from the use of increasingly sophisticated communications technology. Thus, we have no occasion to explore that subject beyond its discussion in Rowe.

[10] Neder and Roy applied harmless error analysis to court's failures to charge elements of crimes that the government was obliged to prove beyond a reasonable doubt. Accord Peck v United States, 106 F.3d 450, 454-57 (2d Cir. 1997). It necesarily follows that harmless error analysis can be applied to a possible charging omission with respect to venue, which is not an element of the crime and requires only proof by a preponderance of the evidence.

Agent Grey] in New York." Telephone Tr. Oct. 20, 2001, at 2. Indeed, DeVries effectively told Rommy that he was in Manhattan by noting that, as they spoke, he was looking at the site of the recently collapsed World Trade Center. From this conversation, Rommy would have to have foreseen the reasonable likelihood that future telephone calls from the smuggler contact (Agent Grey) would emanate from his base of operations in New York.[1111] See generally United States v. Svoboda, 347 F.3d at 483 (holding that defendant, who was "savvy investor," could reasonably foresee that his stock trades would be executed on either NYSE or AMEX in Southern District of New York); United States v. Kim, 246 F.3d at 193 (holding that defendant who knew his victim paid invoices from a bank located in the Southern District of New York could reasonably foresee mailings in that district). Thus, if the district court had instructed the jury on Rommy's ability to foresee the location of the government agent's calls, we have no doubt that the jury would still have found venue.

Indeed, this conclusion is only reinforced by evidence that it was Rommy's specific conspiratorial purpose to smuggle ecstasy pills into New York. Rommy acknowledged both to his confederates Bosch and Rinaldi and to Agent Grey that fellow conspirators were already in New York ready to accept delivery of the smuggled pills and to pay for their transport. It was in this context that Rommy encouraged DeVries to

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[11] Because Rommy did not ask the district court to distinguish between the Southern and Eastern Districts of New York in charging the jury, we have no occasion to consider the fact that the city's boroughs span both venues.

find someone to facilitate the pill shipment through New York's ports. Once DeVries told Rommy that he had located such a "friend in New York," Telephone Tr. Oct. 20, 2001, at 2, Rommy "must have known or contemplated" that subsequent telephone calls from this smuggler would likely emanate from New York, *United States v. Rowe*, 414 F.3d at 279 (internal quotation marks omitted).

Like Cordero, then, this is not a case in which venue in the Southern District of New York is the product of some "chance use of a telephone" by a government agent. *United States v. Cordero*, 668 F.2d at 44. Rather, the calls here at issue were placed from or to the Southern District of New York because Rommy himself had identified New York as the desired destination point of his smuggling scheme and was aware that individuals who could further the scheme were located in New York. *See id*. (citing defendants' knowledge that undercover agent was in District of Puerto Rico and that drug smuggling scheme "was bound for completion in Puerto Rico" in concluding that call from agent to defendants "continued" crime in that district).

Accordingly, we conclude that the district court correctly charged the jury that a call placed by a government actor in Manhattan to Rommy in Amsterdam could establish venue in the Southern District of New York provided Rommy used the call to further the objectives of the charged conspiracy.

B. The Challenged Charge Did Not Violate Fed. R. Crim. P. 30

Rommy contends that the challenged jury charge nevertheless violated Rule 30 of the Federal

Rules of Criminal Procedure because it was at odds with agreements reached at the charging conference about how the jury would be instructed as to venue. We disagree.

Rule 30 both permits parties to "request in writing" specific jury instructions, see Fed. R. Crim. P. 30(a), and requires the trial court to rule on those requests "before closing arguments," id. 30(b). The rule is grounded in "basic concepts of fairness," allowing "counsel to conform their arguments to the law as it will thereafter be presented by the judge to the jury." United States v. James, 239 F.3d 120. 124 (2d Cir. 2000) (internal quotation marks omitted). The rule can thus be violated by a trial judge "giving instructions that he did not inform counsel he would give, or by not giving instructions that he informed counsel he would." Id. Reversal on the basis of a Rule 30 violation is warranted, however, only "where the defendant can show that he was substantially misled in formulating his [closing] arguments or otherwise prejudiced." Id. (internal quotation marks omitted); accord United States v. Prawl, 168 F.3d 622, 629 (2d Cir. 1999); United States v. Adeniji, 31 F.3d 58, 64 (2d Cir. 1994). That is not this case.

The question whether venue could be based on a call from a government actor in the Southern District of New York to Rommy in the Netherlands was first raised in connection with defendant's Rule 29 motion for acquittal. The district court concluded, "I don't have to reach that [question]" because there is evidence of "a call initiated by the defendant" to the Southern District of New York. Trial Tr. 613. When the issue resurfaced at the charging conference, the record shows that the district court made no ruling: "I think

I want to think a little bit more about this issue of the [outgoing] phone call." Id. at 634. Ultimately, it opted to finesse the point, offering the jury an illustrative example of venue that did not address the possibility of outgoing calls establishing venue:

> For example, if you find by a preponderance of the evidence that after the alleged conspiracy was formed, a telephone call in furtherance of the conspiracy was made to a location in the Southern District of New York, that would be sufficient to fulfill the venue requirement, even if the call was made to an undercover agent or some other nonconspirator.

Id. at 748-49 (emphasis added).

Neither the prosecution nor the defense requested the district court to decide the outgoing call issue before summation. Rather, the parties, no less than the district court, apparently took a chance that the jury might decide the case without any need to resolve the outgoing-call question. The gamble did not pay off. The jury's direct inquiry about outgoing calls, posed in the midst of deliberations, required the district court to address the question left unanswered at the charging conference: whether the outgoing-call evidence could support venue.

In these circumstances, we identify no Rule 30 violation. As our case law makes plain, when a defendant is on notice that the propriety of a particular jury instruction is subject to further consideration by the court, he cannot claim to have been substantially misled in framing his summation. See United States v.

Eisen, 974 F.2d 246, 256-57 (2d Cir. 1992) (holding that where defendant "was on notice that his requested charge was the subject of further consideration," he "could not have been substantially misled by the Court in formulating his summation argument" (internal quotation marks omitted)). Indeed, although Rommy contends that the challenged instruction was prejudicial because it "cut the legs out from beneath" his manufactured venue argument, Appellant's Br. 35, the instruction did no such thing. Assuming the viability of a manufactured venue defense — which is debatable, see infra at **[35-38]** — that doctrine functions only as a basis for rejecting venue in cases in which the factual predicates for venue are established. Cf. United States v. Myers, 692 F.2d 823, 847 n.21 (2d Cir. 1982) (challenging venue, despite overt acts in Eastern District of New York, based on purported government overreaching in steering those acts into district). By instructing the jury that outgoing calls from, as well as incoming calls to, a government agent in the Southern District of New York could constitute factual predicates for venue in that district, the district court in no way undermined Rummy's argument that, wha.:ever predicates might support venue in the Southern District of New York, those predicates had been unfairly manufactured by the government to prosecute Rummy in a district that had no actual connection to the charged crime.

c. The District Court Did Not Err in Failing to Charge "Manufactured Venue" in Response to the Jury Inquiry

______Rommy asserts that the district court committed reversible error in failing to include a "manufactured venue" charge in its response to the jury inquiry about outgoing calls. Specifically, Rommy faults the court for not instructing the jury that, if Agent Grey placed telephone calls to Rummy for the purpose of "manufacturing venue" in the Southern District of New York, venue in that district could not be sustained.

Rummy's argument fails for several reasons. First, the district court acted well within its discretion in concluding that the requested instruction was not strictly responsive to the jury's inquiry as to whether outgoing calls generally, and Agent Grey's October 17 call in particular, could support venue.[12] While an accused is entitled to have the trial court include in its initial instructions to the jury "any defense theory for which there is a foundation in the evidence," United States v. Allen. 127 F.3d 260,265 (2d Cir. 1997) (internal quotation marks omitted), a trial court responding to a note from a deliberating jury is only required to answer the particular inquiries posed. The trial court enjoys considerable discretion in construing the scope of a jury inquiry and in framing a response tailored to the inquiry. See United States v. Young, 140 F.3d 453, 456 (2d Cir. 1998) (noting that response to jury request "is a matter committed to the sound exercise of a trial court's discretion"). In doing so, it is not required to reference specific arguments advanced or defenses raised by counsel in urging particular outcomes; cf. Arizona v. Johnson, 351 F.3d 988,994

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[12] The district court's response is quoted in its entirety supra at [16-17].

(9th Cir. 2003) ("Because the jury may not enlist the court as its partner in the fact finding process, the trial judge must proceed circumspectly in responding to inquiries from the jury."). That conclusion applies with particular force in this case because Rommy argued manufactured venue to the jury without requesting any such instruction from the court in the initial charge. In these circumstances, he can hardly claim reversible error in the district court's refusal to charge the concept in response to a jury note that did not inquire on that subject.

Further, this court has never specifically ruled that a defendant is entitled to a manufactured venue charge. The concept derives from a footnote in United States v. Myers, in which this court did no more than leave open the possibility of invalidating venue in circumstances where the "key events occur in one district, but the prosecution, preferring trial elsewhere, lures a defendant to a distant district for some minor event simply to establish venue." 692 F.2d at 847 n.21 (citing United States v. Archer, 486 F.2d 670, 682 (2d Cir. 1973) (holding that government agents cannot manufacture federal jurisdiction)); see United States v. Naranjo, 14 F.3d at 147 (rejecting defendant's claim that government "artificially created venue" in district). Myers itself presented no such venue concern because the "key events" of the crime had, in fact, occurred in the district of prosecution. United States v. Myers, 692 F.2d at 847 n.21. Thus, we had no occasion conclusively to decide the availability of such a defense, much less the propriety of submitting it to a jury.

In the quarter century since Myers, this court has never vacated a conviction on the basis of manufactured venue. Several of our sister circuits, moreover, have specifically rejected or at least questioned the doctrine. See United States v. Rodriguez-Rodriguez, 453 F.3d 458, 462 (7th Cir. 2006) (rejecting both manufactured venue and manufactured jurisdiction); United States v. Al-Talib, 55 F.3d 923, 929 (4th Cir. 1995) ("There is no such thing as manufactured venue or venue entrapment." (internal quotation marks omitted)); see also United States v. Springs, 102 F.3d 1245, 1250 (D.C. Cir. 1996) (expressing reservations as to "manufactured venue"); Andrews v. United States, 817 F.2d at 1279-80 [7th Cir.] (observing that appropriate way to address prosecution venue shopping is through transfer pursuant to Fed. R. Crim. P. 21). However convincing their reasoning, we need not here conclusively decide the continued vitality of the manufactured venue doctrine because the record evidence clearly does not support its application to this case. See United States v. Stewart, 433 F.3d 273, 310 (2d Cir. 2006) (holding that refusal to give charge requested by defense does not warrant reversal unless "instruction is legally correct, represents a theory of defense with basis in the record that would lead to acquittal, and the theory is not effectively presented elsewhere in the charge" (internal quotation marks and citations omitted)).

Rommy was not "lure[d]" telephonically into the Southern District of New York to pursue a smuggling conspiracy otherwise focused elsewhere. United States v. Myers, 692 F.2d at 847 n.21. To the contrary, Rommy selected the district as the destination objective of the charged conspiracy. It was he who proposed smuggling ecstasy into New York, first to Bosch and then to DeVries and Agent Grey, telling them that he had confederates in place in New York ready to accept delivery of ecstasy pills. When Bosch expressed a preference to import the pills through Miami, Rommy stated that his New York associates would travel to Florida to arrange for the drugs' transportation to New York. Rommy reiterated his New York objective to Agent Grey both guardedly in the recorded telephone conversations and bluntly in the videotaped Bermuda meeting. Viewed in this context, Rommy's five recorded telephone conversations with government actors in New York cannot be viewed as "minor event[s]" engineered "simply to establish venue." Id. Rather, they were overt acts critical to the furtherance of a criminal scheme that Rommy wished to realize in the Southern District of New York.

Accordingly, we identify no error in the district court's refusal to charge manufactured venue in response to the jury's venue inquiry.

B. Evidentiary Challenges

Rommy submits that a number of erroneous evidentiary rulings require reversal of his conviction. Specifically, he asserts that (1) the district court erred in failing to suppress the five telephone calls recorded in New York and the videotape of the meeting in Bermuda as fruits of DEA violations of the Mutual Legal Assistance Treaty ("MLAT") in effect between the United States and the Netherlands; (2) his post-indictment statements to DEA agents while incarcerated in a Madrid prison should have been suppressed for failure to secure waivers of his Fifth and Sixth Amendment rights; and (3) by allowing the prosecution to read into evidence the transcript of a telephone conversation recorded in 2000 by Dutch authorities, the district court violated Fed. R. Evid. 803(5) and 901(a), as well the Due Process and Confrontation Clauses of the Constitution. None of these arguments warrants reversal.

1. The MLAT Challenge to the Admission of Recorded Evidence

Rommy contends that the DEA violated the MLAT in effect between the United States and the Netherlands, as well as Dutch domestic law, by employing a confidential informant (DeVries) to gather evidence in the Netherlands after Dutch officials had denied the United States' MLAT request to conduct an undercover investigation in their country. Rommy submits that the treaty violation required the district court to suppress all evidence obtained from DeVries's use as an informant in the Netherlands and all fruits derived therefrom, specifically, the five telephone calls with Rommy in the Netherlands that were, in fact, recorded in New York, and the videotaped meeting between Rommy, DeVries, and Agent Grey in Bermuda.

On review of a district court's ruling on a motion to suppress evidence, we examine findings of fact for clear error, viewing the evidence in the light most favorable to the government, and we apply de novo review to the district court's conclusions of law. See United States v. Rodriguez, 356 F.3d 254, 257 (2d Cir. 2004); United States v. Casado, 303 F.3d 440, 443 (2d Cir. 2002). Following these principles, we conclude that Rommy's treaty argument fails for two reasons.

First, Rommy cannot demonstrate a treaty violation. The Treaty on Mutual Assistance in Criminal Matters between the United States and the Netherlands, a self-executing agreement that entered into force in this country on September 15, 1983, see Treaty on Mutual Assistance in Criminal Matters, June 12, 1981, U.S.-Neth., 35 U.S.T. 1361, T.I.A.S. No. 10,734, provides various means for the governments of the two countries to provide legal assistance to one another in criminal matters, see id. art. I (describing type of assistance available); see also id. arts. 13-16 (outlining procedures for making and responding to requests for assistance). It also places certain limitations on how information obtained pursuant thereto may be used. See id. art. 11. By its express terms, however, the treaty has no application to evidence obtained outside the MLAT process. Article 18, subsection 1, states:

> Assistance and procedures provided by this Treaty shall be without prejudice to, and shall not prevent or restrict, any assistance or procedure available under other international conventions or arrangements or under the domestic laws of the Contracting Parties.

Id. art. 18, subsec. 1. This does not mean that United States or Dutch authorities, operating without MLAT authorization, may act with impunity in conducting law enforcement investigations in each others' countries. To the contrary, it means that, when securing evidence without MLAT authorization, foreign government officials lacking diplomatic immunity must conduct themselves in accordance with applicable "domestic laws." id.

______Thus, when DEA agents proceeded to use DeVries as a confidential informant in the Netherlands even after their MLAT request to do so was denied, they did not violate the treaty. They did, how ever, subject themselves and their informant to any constraints imposed on private actors by Dutch law. We need not here decide whether any DEA actions violated Dutch domestic law.[13] The admissibility of evidence in a United States court depends solelyin compliance with United States law. See United States v. Morrison, 153 F.3d 34, 57 (2d Cir. 1998) (observing that "federal law governs the admissibility of evidence in a federal criminal trial"); United States v. Brown, 52 F.3d 415, 420 (2d Cir. 1995) (noting that "federal law is applicable in a federal prosecution even when state police officers [are] involved" in investigating case); United States v. Pforzheirner, 826 F.2d 200, 203 (2d Cir. 1987) (stating that "federal law governs federal prosecutions in federal court" (internal quotation marks omitted)); cf. United States v. Alvarez-Machain, 504 U.S. 655, 670 (1992) (holding that defendant's forcible abduction from Mexico, authorized by DEA officials, did not prohibit trial in United States for violations of United States criminal laws). Rommy makes no claim on appeal that the DEA's undercover investigation generally, or its recording of the telephone calls in the United States or the meeting in Bermuda specifically, violated any United States law.

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[13] Although DeVries supplied the DEA with information obtained in the course of his undercover dealings with Rommy, it does not appear that the DEA recorded any conversations or conducted any wiretaps in the Netherlands, as proposed in the original MLAT request. Indeed, nothing in the record indicates that Dutch authorities think that their law was violated in this case. A contrary inference might be drawn from the fact that the Netherlands granted the United States' second MLAT request, sharing its own evidence against Rommy for use in the Southern District prosecution.

A second reason Rommy's MLAT argument fails is that he cannot demonstrate that the treaty creates any judicially enforceable individual right that could be implicated by the government's conduct here. As the Supreme Court has long observed, absent explicit treaty language conferring individual enforcement rights, treaty violations are generally addressed by the signatory sovereigns through diplomatic channels. See Head Money Cases, 112 U.S. 580, 598 (1884) (noting that"treaty is primarily a compact between independent nations" and "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it"). For any number of reasons, sovereigns may elect to overlook non-compliance with particular treaty requirements in given cases. Thus, a proper respect for the diplomatic choices of sovereign nations prompts courts generally to apply "a strong presumption against inferring individual rights from international treaties." United States v. De La Pava, 268 F.3d 157, 164 (2d Cir. 2001).

In United States v. Davis, 767 F.2d 1025 (2d Cir. 1985), we were required to consider a similar use-limitation provision in an MLA T between the United States and Switzerland. We concluded that the "clear and unambiguous language" reflected the intention of the signatory states that the Treaty would not —

except in certain specifically designated circumstances — confer judicially enforceable rights on individuals," and that any potential exceptions were "not implicated" in Davis's case. Id. at 1030. Accordingly, we rejected his claim that evidence allegedly obtained in violation of that treaty should be excluded.[14]

Here, the signatories' intent not to create judicially enforceable individual rights is equally clear. Article 18, subsection 2, of the MLAT states:

> Except where this Treaty specifically sets forth rules for the admissibility of evidence, the provisions of this Treaty shall not give rise to a right on the part of any person to take any action in a criminal proceeding to suppress or exclude any evidence. This Treaty does not expand or limit rights to judicial review otherwise available under domestic law.

MLAT, art. 18, subsec. 2.

Rommy argues that Article 11, subsection 2, of the treaty "specifically" addresses "the admissibility of evidence," and therefore provides an exception to this general bar to the creation of individual rights. That provision states:

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[14] The Davis panel referred to the question as one of "standing." Id. We think that the use of the term was analytically incorrect. Neither Rommy nor Davis failed to allege, e.g., a "direct injury" as the constitutional standing doctrine requires. See, e.g., City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983). Nor does it make sense in this context to discuss the Supreme Court's "prudential" standing doctrine, which may prevent parties from asserting 1) the rights of someone not before the court, 2) generalized grievances, or 3) rights outside the "zone of interests" protected by a given statutory or constitutional provision. See e.g., Warth v. Seldin, 422 U.S. 490, 499 (1975).

> The Requesting State shall not use any evidence obtained under this Treaty, nor any information derived therefrom, for purposes other than those stated in the request, without the prior consent of the Requested State.

Id., art. 11, subsec. 2.

Assuming arguendo that this language does create a judicially enforceable individual right, i.e., that a criminal defendant could object in court to the use of certain evidence "for purposes other than those stated in the request," id., the provision is of no help to Rommy. The evidence Rommy seeks to exclude — the five telephone calls with Rommy in the Netherlands (recorded in New York) and the recording of the meeting in Bermuda — were obtained after a request from the United States to make such recordings was refused.Accordingly, we have no difficulty concluding that this evidence was not "obtained under" the M LAT and is, therefore, not subject to the strictures of Article 11 . Id. Because the challenged recordings were not obtained pursuant to treaty and nothing in Article 11, subsection 2, purports to regulate the admissibility of evidence obtained outside the treaty process, the propriety of suppressing any such evidence is governed solely by United States domestic law. See generally Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2678-82 (2006) (observing that exclusionary rule "is an entirely American legal creation" and that appli cation of rule is governed by United States domestic law).

Because Rommy's MLAT-based argument for suppression of evidence thus lacks any foundation in the text of the treaty, we conclude that it was properly denied.

2. The Constitutional Challenges to the Madrid Prison Statements

Unrefuted record evidence demonstrates (1) that Rommy himself requested a meeting with DEA agents at the Madrid prison where he was incarcerated pending extradition to the United States; (2) that Rommy's avowed purpose was to persuade the agents that he could provide extensive information on large-scale drug traffickers; (3) that, in the course of the meeting, Rommy in fact volunteered incriminating information about himself[15] and more than a dozen other traffickers, none of whom were known to the agents in attendance; and (4) that Rommy arranged for his girlfriend, but not his lawyers, to attend the meeting. Rommy nevertheless contends that, because the agents posed questions at the meeting, his statements were inadmissible at trial without a waiver of his Fifth Amendment Miranda rights and his Sixth Amendment right to counsel.

At the outset, we observe that neither in the district court nor on this appeal do the parties dispute the applicability of Fifth and Sixth Amendment protections to the custodial interrogation of a foreign national outside the United States by agents of this country engaged in a criminal investigation. See generally United States v. Bin Laden, 132 F. Supp. 2d 168, 185-89 (S.D.N.Y. 2001) (positing right to Miranda warnings in that context). The only issues presented for our review arc whether the agents' actions at the Madrid prison meeting constituted interrogation for purposes of the Fifth Amendment or the deliberate elicitation of incriminating statements for purposes of the Sixth Amendment.

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[15] While Rommy admitted drug trafficking in Europe, he was careful to insist that he had never transported drugs to the United States, despite the purported importuning of various persons, including DeVries.

On review of a motion to suppress evidence, we examine the record in the light most favorable to the government, see United States v. Oates, 560 F.2d 45, 49 (2d Cir. 1977), reviewing the district court's factual findings for clear error and its legal conclusions de novo, see United States v. Rodriguez, 356 F.3d at 257-58; United States v. Garcia. 339 F.3d 116, 118-19 (2d Cir. 2003).

a. Fifth Amendment Claim

Rommy's Fifth Amendment claim is based solely on his failure to be advised of and to waive the rights identified in Miranda v. Arizona, 384 U.S. at 479; accord Dickerson v. United States, 530 U.S. 428, 443-44 (2000) (reaffirming Miranda). He does not claim that his statements were otherwise coerced.

Because Miranda warnings are intended "to dissipate the compulsion inherent in custodial interrogation and, in so doing, guard against abridgment of the suspect's Fifth Amendment rights," Moran v. Burbine, 475 U.S. 412, 425 (1986), it naturally follows that Miranda's warning and waiver requirements apply only in the context of "custodial interrogation," i.e., a person must have been both in custody and subjected to interrogation for statements made without warnings or waiver to be inadmissible in the government's case in chief. Miranda v. Arizona, 384 U.S. at 444; accord United States v. Newton, 369 F.3d 659, 669 (2d Cir. 2004). Miranda defined "interrogation" as "questioning initiated by law enforcement officers." 384 U.S. at 444. The Supreme Court later refined this definition to include "not only . . . express questioning, but also ... any words or actions on the part of the police . . . that the police should know arc reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (footnotes omitted); see id. at 300-01 (defining interrogation as "either express questioning or its functional equivalent"); accord Rosa v. McCray, 396 F.3d 210, 220-21 (2d Cir. 2005); United States v. Carmona, 873 F.2d 569, 573 (2d Cir. 1989). Because the underlying purpose of the Miranda rule is to dispel compulsion, the relevant inquiry in deciding whether words or actions constitute interrogation focuses "primarily upon the perceptions of the suspect, rather than the intent of the police." Rhode Island v. Innis, 446 U.S. at 301; see Wayne R. LaFave et al., 2 Criminal Procedure § 6.7(a), at 543 (2d ed. 1999) (contrasting Miranda's focus on perception of suspect in determining whether incriminating statements are product of interrogation with Sixth Amendment's focus on intent of police in deciding whether statements were deliberately elicited in violation of right to counsel).

As Miranda itself recognized, however, "[v]olunteered statements of any kind are notbarred by the Fifth Amendment" and, thus, do not require preliminary advice of rights. Miranda v. Arizona, 384

U.S. at 478 ("There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make." (footnote omitted)); accord Rhode Island v. Innis, 446 U.S. at 300. In Edwards v. Arizona, the Supreme Court explained that, even if a defendant has asserted his Fifth Amendment right to counsel, if the defendant "himself initiates further communication" with law en forcement, "nothing in the Fifth and Fourteenth Amendments would prohibit the police from merely listening to his voluntary, volunteered statements and using them against him at the trial." 451 U.S. 477, 485 (1981).

> Edwards cautioned, however, that
> [i]f, as frequently would occur in the course of a meeting initiated by the accused, the conversation is not wholly one-sided, it is likely that the officers will say or do something that clearly would be "interrogation." In that event, the question would be whether a valid waiver of [the defendant's Fifth Amendment rights] had occurred . .

Id. at 486 n.9. Rommy asserts that his case fits this scenario. While he concedes that he initiated the meeting with DEA agents at which the challenged statements were made, he submits that because the conversation was "not wholly one-sided," it must be viewed as interrogation requiring advice of rights. Id.

In fact, Edwards draws no bright line requiring a finding of custodial interrogation in every case in which a law enforcement officer interrupts a defendant's volunteered narrative to ask a question. As a leading commentator has observed, "Miranda covers only police conduct likely to be coercive ... which cannot be said of a question that does nothing more than seek clarification of what the defendant has already volunteered." LaFave et al., 2 Criminal Procedure § 6.7(d), at 567. This comports with the Supreme Court's instruction that "[f]idelity to the doctrine announced in Miranda requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated." Berkemer v. McCarty, 468 U.S. 420, 437 (1984). A number of our sister circuits have concluded that Miranda concerns are not implicated in follow-up questions to volunteered statements. See United States v. Koontz. 143 F.3d 408, 411 (8th Cir. 1998) (holding "statements made in response to a law enforcement officer's attempt to seek clarification of a defendant's remarks, during an interview requested by the defendant, are not the products of interrogation" (internal quotation marks omitted)); United States v. Gonzales, 121 F.3d 928, 940 (5th Cir. 1997) (ruling that "when a suspect spontaneously makes a statement, officers may request clarification" of ambiguities "without running afoul of the Fifth Amendment"); Andersen v. Thieret, 903 F.2d 526, 532 (7th Cir. 1990) (rejecting custodial interrogation challenge when, in response to suspect's volunteered statement, "I stabbed her," police asked, "Who?"); United States v. Rhodes, 779 F.2d 1019, 1032 (4th Cir. 1985) (holding that no interrogation occurred where, in response to suspect's volunteered statement, "You can't take that," police inquired, "why," and suspect replied, "I can't run my business without that"). But see United States v. Crowder, 62 F.3d 782, 785-86 (6th Cir. 1995) (holding that police officer interrogated suspect when, after suspect stated that shotgun was "in the wood," officer asked clarifying question about location).

We do not — indeed, without review of a full record, we cannot — here decide whether we would reach the same conclusion as our sister circuits in each of these cases. We note simply our agreement with the general principle recognized therein: where a person in custody volunteers incriminating information to the police, simple clarifying questions do not necessarily constitute interrogation. In so holding, we recognize that follow-up questions can take a variety of forms. Careful inquiry into the underlying facts and circumstances may thus be necessary to determine whether a suspect in a particular case would have reasonably understood that the follow-up questions were seeking only to clarify information already volunteered rather than to compel further incriminatory disclosures. In this respect, absent extraordinary circumstances, a court may generally conclude that follow-up questions asking only for volunteered information to be repeated or spelled do not constitute interrogation. The same conclusion might also easily apply to discrete questions seeking confirmation of what appears implicit in the volunteered disclosure.[16]" But where questions seek to

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[16] For example, when a volunteered statement, "I bought the drugs on March 15," prompts an agent to ask, "Of this year?" the exchange is unlikely to constitute interrogation even if the defendant responds to the former inquiry by saying, "No, 2006."

"expand the scope" of volunteered statements, a more searching inquiry may be necessary to determine whether they have moved beyond neutral clarification to interrogation. LaFave et al., 2 Criminal Procedure § 6.7(d), at 566-67 (suggesting that defendant's statement given after follow-up questions is appropriately deemed "volunteered only if the questions are neutral efforts to clarify what has already been said rather than apparent attempts to expand the scope of the statement previously made").

This case, however, presents us with no such concerns. Although Rommy claimed that the agents asked more than follow-up questions at the Madrid meeting, nothing in the record indicates clear error in the district court's contrary conclusion.[17] As the district court expressly found, Rommy not only "voluntarily initiated the meeting with the DEA agents," he "chose the subjects" discussed. United States v. Rommy, No. 02 Cr. 994 (JSR), 2005 WL 1941625, at *2 (S.D.N.Y. July 28, 2005). Agent Fernandez testified without contradiction at trial that, because he knew nothing about Rommy's drug activities or the activities of the persons named, the

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[17] Although Rommy faults the district court for failing to conduct an evidentiary hearing on the scope of the agents' questions, defense counsel explored the issue on cross-examination of Agent Fernandez at trial and developed no evidence at odds with the district court's pre-trial findings. In any event, as we note infra at [58-59], even if Rommy could persuade us that his Madrid prison statement should have been suppressed, the admission of this evidence was plainly harmless in light of other overwhelming evidence of guilt.

Madrid meeting was basically a narrative by Rommy,[18] punctuated only by questions to clarify the spellings or dates of information being volunteered and, on one occasion, to understand a drug abbreviation. On de novo review of Rommy's legal challenge, we conclude that such questions did not transform the meeting into an interrogation requiring the advice or waiver of Miranda rights. Nothing in the record supports a conclusion that Rommy could have perceived the agents to be seeking incriminating information beyond what he had already volunteered. See Rhode Island v. Innis, 446 U.S. at 301.

In an effort to avoid this conclusion, Rommy asserts that Agent Fernandez's statement about leniency converted the prison meeting into an interrogation. In support, he cites United States v. Montana, in which this court held that a federal agent's "unsolicited statement informing the defendants that any cooperation would be brought to the attention of the Assistant United States Attorney constituted interrogation." 958 F.2d 516, 518 (2d Cir. 1992) (internal quotation marks omitted). This case is plainly distinguishable from Montana. Most obviously, Agent Fernandez's statement about leniency was not "unsolicited," but a direct response to Rommy's assertion that his purpose in asking for a meeting with DEA agents was to obtain leniency. In United States v. Miller, we held that an agent's statement to a defendant that he "could help himself by cooperating did not constitute interrogation since it was not unsolicited but was made in response to [defendant's] own question as to what penalties he faced." 116 F.3d 641, 680 (2d Cir. 1997). In fact, this case raises even fewer concerns than Miller because Agent Fernandez did not suggest to Rommy that he "could help himself by cooperating" with the DEA. Id. Quite the contrary, the agent warned Rommy that cooperation might not result in his obtaining the desired leniency, whereupon the agent even offered to terminate the meeting. Under these circumstances, Rommy cannot claim that his decision to proceed with the meeting and to volunteer extensive statements was the product of interrogation.

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[18] Rommy's natural loquaciousness in touting his drug experience and familiarity with large-scale traffickers was apparent on the videotape of the Bermuda undercover meeting.

Accordingly, we conclude that the district court properly refused to suppress Rommy's Madrid statements on Fifth Amendment grounds.

b. Sixth Amendment Claim

______Rommy submits in the alternative that suppression of the Madrid statements was required because they were made after he had been indicted in the United States and without a knowing and intelligent waiver of his Sixth Amendment right to counsel.

The Sixth Amendment states, in pertinent part, that "Nil all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The right attaches at the "initiation of adversary judicial proceedings," such as arraignment or the filing of an indictment, United States v. Gouveia, 467 U.S. 180, 188 (1984); United States v. Yousef, 327 F.3d 56, 140

(2d Cir. 2003), and extends to all "critical stages" of a criminal prosecution, including post-indictment interviews with law enforcement authorities, Michigan v. Jackson. 475 U.S. 625, 630 (1986); sec Patterson v. Illinois. 487 U.S. 285, 290 (1988); Maine v. Moulton, 474 U.S. 159, 170 (1985). Once the right attaches, "the Sixth Amendment renders inadmissible in the prosecution's case in chief statements deliberately elicited from a defendant without an express waiver of the right to counsel." Michigan v. Harvey, 494 U.S. 344, 348 (1990) (internal quotation marks omitted); accord Massiah v. United States. 377 U.S. 201, 206 (1964); United States v. Edwards, 342 F.3d 168, 182 (2d Cir. 2003). In contrast to the Fifth Amendment's interrogation inquiry, which focuses "primarily upon the perceptions of the suspect," Rhode Island v. Innis, 446 U.S. at 301, deliberate elicitation under the Sixth Amendment "covers only those statements obtained as a result of an intentional effort" on the part of government officials to secure incriminating statements from the accused, United States v. Stevens, 83 F.3d 60, 64 (2d Cir. 1996) (emphasis added); see also Fellers v. United States, 540 U.S. 519, 524 (2004) (noting that Sixth Amendment deliberate elicitation standard is "expressly distinguished" from Fifth Amendment's custodial interrogation standard); LaFave et al., 2 Criminal Procedure § 6.7(a), at 543.

Rommy submits that, absent an explicit waiver of the right to counsel,[19] the Sixth Amendment, in fact, erects a higher bar to the admission of uncounseled statements than the Fifth Amendment. While acknowledging that "nothing in the Sixth Amendment prevents a suspect charged with a crime and represented by counsel from voluntarily choosing, on his own, to speak with police in the absence of an attorney," Michigan v. Harvey, 494 U.S. at 352; see Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986), Rommy points to language from various Supreme Court cases in urging a conclusion that any government action beyond merely listening to the defendant requires an express waiver of the right to counsel. See United States v. Henry, 447 U.S. 264, 271-73 (1980) (holding that, even though prison informant had not actually questioned the defendant, he was not simply "a passive listener" but had "stimulated" conversations amounting to deliberate elicitation); cf. Kuhlmann v. Wilson, 477 U.S. at 459 (holding that, to pursue Sixth Amendment claim, "defendant must demonstrate that the [government] took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks"); United States v. Edwards, 342 F.3d at 182 (observing that, if "defendant proceeds to make incriminating statements 'without any prompting or questioning by [government] officers,' his Sixth Amendment rights are not violated even if he had previously requested counsel" (alteration in original) (quoting United States v. Stevens, 83 F.3d at 64 (2d Cir. 1996))).

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[19] Because the district court concluded that Rommy's statements were volunteered, it appears not to have made a specific ruling as to waiver of Sixth Amendment rights.

Because the concerns animating the Sixth Amendment right to counsel differ from those animating the Fifth Amendment's prohibition on compelled incrimination, the Supreme Court has itself differentiated the deliberate elicitation inquiry from the custodial interrogation inquiry. *See* *Fellers v. United States*, 540 U.S. at 524. *Compare* *United States v. Wade*, 388 U.S. 218, 226 (1967) (observing that Sixth Amendment right to counsel "guarantee[s] that [the accused] need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial"), with *Moran v. Burbine*, 475 U.S. at 425 (explaining that purpose of *Miranda* warnings "is to dissipate the compulsion inherent in custodial interrogation and, in so doing, guard against abridgment of the suspect's Fifth Amendment rights"). Understanding these different concerns proves most important in dealing with classic situations where the Sixth, but not the Fifth, Amendment protections apply, *e.g.*, where police engage a person not in custody whose Sixth Amendment right to counsel has attached, or where a prison informant somehow importunes a defendant to make incriminating statements. *See generally* *Kuhlmann v. Wilson*, 477 U.S. at 459 (noting that -primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation"). It is less obvious why the two standards should yield different results in this case where an indicted defendant, participating in a meeting that he had requested with persons he knew were law enforcement officers, was asked a few neutral follow-up questions in the course of a lengthy volunteered statement.

We recognize that when an agent, listening to a defendant's volunteered statement, asks him to spell a name, clarify a date, or explain an abbreviation, he does more than merely listen to what the defendant is saying. *See id*. at 459; cf. *United States v. Henry*, 447 U.S. at 271 n.9 (observing that electronic recording device poses no deliberate elicitation concern because it "has no capability of leading the conversation into any particular subject or prompting any particular replies"). But it is far from clear that such limited follow-up questions could be found to "stimulate" discussion, to "lead[] the conversation into any particular subject," or to "prompt[] any particular replies" beyond what Rommy himself had volunteered. *United States v. Henry*, 447 U.S. at 271 n.9.

We need not decide whether the DEA 's follow-up questioning constituted deliberate elicitation, however, because even if that questioning rendered Rommy's volunteered prison statement inadmissible under the Sixth Amendment, the error would certainly be plainly harmless in light of other overwhelming evidence of guilt. *See*, *e.g*.., *Mitchell v. Esparza*, 540 U.S. 12, 17-18 (2003) ("A constitutional error is harmless when it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (internal quotation marks omitted)); *see United States v. Dhinsa*, 243 F.3d 635, 649-50 (2d Cir. 2001) (collecting cases discussing harmless error in light of erroneous admission of evidence).

To the extent Rommy's Madrid prison statement acknowledged his own history of drug trafficking in Europe and similar criminal activity by Bosch, Rinaldi, Zuchetto, Allen, and DeVrics, among numerous others, the statement corroborated similar testimony by Bosch and Rinaldi, which, in turn, may have lent credibility to their account of Rommy's interest in smuggling ecstasy into New York. But, wholly apart from this co-conspirator testimony, the charged conspiracy was overwhelmingly established by Rommy's own words, recorded on five telephone conversations and at a meeting in Bermuda. On these recordings, the jury heard Rommy actively and explicitly negotiating the shipment of 300,000 ecstasy pills from Europe to New York. Further, on these recordings, particularly the Bermuda videotape, Rommy acknowledged that he had confederates in place in New York ready to take possession and dispose of the pills upon their arrival in the United States.

On such a record, we can confidently conclude that any error in the admission of the Madrid prison statements was harmless beyond a reasonable doubt.

3. Challenges to the Dutch Wiretap Transcript

Rommy asserts that the district court erred in allowing the prosecution to read into evidence the transcript of an October 30, 2000 telephone call originally recorded by Dutch authorities in which an unidentified person informs Rommy that another unnamed individual has only 6,000 "Versace t-shirts" remaining. The government argued to the jury that this evidence corroborated Bosch's background testimony that, at Rommy's behest, he had transported a shipment of ecstasy pills stamped with the Versace logo to Switzerland. Apparently, the prosecution proffered the transcript rather than the recording itself because Dutch authorities declined to provide the latter in light of the fact that, under Dutch law, the recording should have been destroyed some time earlier. Rommy contends that the transcript's admission did not comport with Fed. R. Evid. 803(5) (providing hearsay exception for past recollection recorded), Fed. R. Evid. 901 (providing for evidence authentication), or the Due Process and Confrontation Clauses of the Constitution.

We review a district court's evidentiary rulings deferentially for abuse of discretion, see United States v. Dupre, 462 F.3d 131, 136 (2d Cir. 2006); United States v. Paulino, 445 F.3d 211, 217 (2d Cir. 2006), and identify none in this case.

a. Authentication Challenge — Fed. R. Evid. 901

To lay a proper foundation for the admission of a transcript into evidence, the government must "produce clear and convincing evidence of authenticity and accuracy." United States v. Hamilton, 334 F.3d 170, 186 (2d Cir. 2003) (internal quotation marks omitted); see United States v. Anderson, 452 F.3d 66, 77 (1st Cir. 2006) (observing that "when transcripts are offered for use, either as evidence or a jury aid, they should be authenticated in the same manner as tape recordings that are offered in evidence" (internal quotation marks omitted)). Under Rule 901 of the Federal Rules of Evidence, authentication is satisfied "by evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a). Illustrative examples of such evidence include the testimony of a "witness with knowledge" that "a matter is what it is claimed to be," id. 901(b)(1), or testimony "describing a process or system used to produce a result and showing that the process or system produces an accurate result," id. 901(6)(9). Where evidence includes a voice identification, authentication may be satisfied "by opinion [testimony] based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." Id. 901(b)(5); see United States v. Tropeano, 252 F.3d 653, 661 (2d Cir. 2001); United States v. Barone, 913 F.2d 46, 49 (2d Cir. 1990).

In this case, the district court acted well within its discretion in finding the challenged transcript adequately authenticated by prosecution witness Antoinette Leichel, a Dutch detective sergeant personally involved in the wiretap investigation from which the transcript derived. Although Det. Leichel had no specific present recollection of the October 30., 2000 call or of preparing the corresponding transcript, she testified that it had been her general practice upon listening to calls intercepted during the investigation to prepare a contemporaneous transcript. This testimony, together with the Dutch production of the transcript in response to the United States' second MLAT request, demonstrated a sufficiently reliable process to authenticate the transcript as a product of the Dutch wiretap investigation.

Insofar as Rommy challenges the authentication of his voice, Det. Leichel testified that Rommy was not originally a subject of the wiretap investigation. Nevertheless, when his voice was identified by a fellow officer familiar with it from another investigation, that served as the basis for her initial identification on the transcripts. About a month after the October 30, 2000 intercept, however, Det. Leichel spoke directly with Rommy at the time of his arrest and personally recognized his voice as the one she had heard on the recorded telephone calls and identified as his on the transcripts. Although Rommy complains that Det. Leichel lacked personal knowledge of Rommy's voice at the time she made an initial attribution with respect to the October 30 call, Rule 901 expressly states that voice identification can be authenticated based upon "hearing the voice at any time." Fed. R. Evid. 901(b)(5) (emphasis added).

b. Hearsay Challenge — Rule 803(5)

______Rommy submits that the district court erred in receiving the transcript into evidence as Det. Leichel's recorded past recollection of what she had heard on the intercepted telephone call. Fed. R. Evid. 803(5) recognizes as a hearsay exception

> [a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly.

For a statement to come within this rule, a proponent must show that (1) the witness's memory of the events detailed in the record was sufficiently impaired; (2)

the witness prepared or adopted the record at or near the time of the events reported; and (3) at that time, the record correctly reflected the witness's knowledge of the reported events. See Parker v. Reda, 327 F.3d 211, 213 (2d Cir. 2003).

Det. Leichel's testimony satisfied all three requirements in establishing the transcript as a record of the words she heard when she listened to the intercepted October 30 conversation. To the extent Rommy reiterates his complaint that Det. Leichel had no personal knowledge of his voice at the time she prepared the transcript, his challenge fails. Any error in the admission of the attribution was harmless in light of Det. Leichel's testimony at trial regarding her present recollection of hearing Rommy's voice at the time of his arrest, and her conclusion that it was the same as the one she had understood to be his on the wire intercepts.[20]

c. Due Process Challenge

Rommy contends that admission of the transcript without the underlying tape recording violated his due process right to a fair trial because he was thus precluded from preparing a competing transcript or proving that the voice on the call was not his.

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[20] Det. Leichel's identification of Rommy's voice provided an adequate foundation for the district court to admit the substance of his recorded statements for their truth as party admissions. See Fed. R. Evid. 801(d)(2). Rommy raises no hearsay challenge to this ruling.

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (internal quotation marks omitted). In this case, Rommy had ample opportunity at trial to alert the jury to the unavailability of the actual recording and to challenge the reliability of the transcript. Further, cross-examination afforded Rommy the opportunity to challenge Det. Leichel's present voice identification by highlighting her inability to recall either the October 30 intercept or the preparation of the transcript, as well as her lack of personal familiarity with Rommy's voice at the time of the alleged recording and transcript preparation. Under these circumstances, we conclude that the unavailability of the original recording did not deprive Rommy of due process. See United States v. Maxwell, 383 F.2d 437, 441-43 (2d Cir. 1967) (rejecting due process challenge to admission of transcript where underlying recording had been accidentally erased and transcript preparer testified as to accuracy); see also United States v. Ross, 33 F.3d 1507, 1514 n.10 (11th Cir. 1994) (concluding, in case in which original recordings were destroyed by Spanish authorities, that due process challenge to transcripts was without merit "in light of [defendant's] ability to cross-examine the government witnesses" who had prepared transcripts).[21]

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[21] Insofar as Rommy cites cases noting that tape recordings, not transcripts, are the best evidence of a recorded conversation, these cases reach that conclusion in circumstances where the recording is available for trial, which, as the district court expressly found, is not this case.

d. Confrontation Clause

Rommy finally claims that the identification of his voice on the transcript violated his Sixth Amendment right to confrontation because that identification derived from the hearsay statement of a Dutch police colleague of Det. Leichel's who did not testify at trial. As we have already observed, the government did not rely on the transcript to identify Rommy's voice; it relied on Det. Leichel's trial testimony. In any event, Rommy's confrontation challenge is meritless.

The Sixth Amendment guarantees an accused the right "to be confronted with the witnesses against him" in all criminal prosecutions. U.S. Const. amend VI. In Rommy's case, the prosecution never attempted to use Leichel's colleague as an absent "witness" against Rommy. Rather, the existence of this colleague was elicited on cross-examination by the defense. The defense purpose was not to prove the truth of the colleague's identification but to suggest the unreliability of Leichel's own claim that she made an independent identification of Rommy's voice after speaking with him at his arrest. Cf. United States v. Craw ford, 541 U.S. 36, 59, n.9 (2004) (noting that Confrontation Clause does not bar even the government from using testimonial statements "for purposes other than establishing the truth of the matter asserted").

In sum, we conclude that none of Rommy's challenges to the district court's admission of the October 30 transcript has merit.

III. Conclusion

To summarize, we conclude that:

(1) the district court (a) properly instructed that venue must be proved by a preponderance of the evidence, rather than beyond a reasonable doubt; (b) correctly charged that a call placed by a government actor in Manhattan to the defendant in Amsterdam could establish venue in the Southern District of New York, provided the defendant used the call to further the charged conspiracy; (c) committed no violation of Fed. R. Crim. P. 30; and (d) properly declined to charge manufactured venue in response to the jury's venue inquiry;

(2) the district court correctly refused to suppress recorded evidence as fruits of alleged DEA violations of the MLA T in effect between the United States and the Netherlands;

(3) defendant's Fifth and Sixth Amendment challenges to statements made to DEA agents at a defense-initiated prison meeting in Madrid are without merit or harmless; and

(4) the district court's receipt into evidence of a telephone transcript prepared by Dutch authorities did not violate the Federal Rules of Evidence, or the Due Process or Confrontation Clauses of the Constitution.

AFFIRMED.

UNITED STATES OF AMERICA, -v- HENK ROMMY, a/k/a "Henk Orlando Rommy," a/k/a "Charles Gordon," a/k/a "Cobra," a/k/a "Black Cobra," Defendant.

02 Cr. 994 (JSR)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

July 25, 2005, Decided
July 28, 2005, Filed

SUBSEQUENT HISTORY:

Affirmed by United States v. Rommy, 07 U.S. App. (2d Cir. N.Y.,Nov. 5, 2007)

DISPOSITION: [*1.] Defendant's five remaining motions to suppress and/or limit use of evidence denied.

COUNSEL: For Henk Rommy, also known as Cobra, also known as Charles Gordon, also known as Henk Orlando Rommy, also known as Black Cobra, Defendant: Richard Willstatter,
GREEN &WILLSTATTER, White Plains, NY.

For USA, Plaintiff: Marc L. Mukasey, U.S. Attorney's Office, New York, NY.

JUDGES: JED S. RAKOFF, U.S.D.J.
OPINION BY: JED S. RAKOFF

OPINION
MEMORANDUM ORDER
JED S. RAKOFF, U.S.D.J.

On June 6, 2005, defendant Henk Rommy brought six motions to suppress and/or limit the use of evidence at his trial on the basis of alleged constitutional and treaty violations. On June 13, 2005, the Court deniedfrom the bench defendant's motion to suppress for discovery violations and reserved decision pending further briefing and argument on the remaining five motions: (1) a motion to suppress a statement that defendant made to U.S. agents in a Madrid police station where no Miranda warnings were given; (2) a motion to suppress the same statement for violation [*2] of defendant's Sixth Amendment right to counsel; (3) a motion to suppress recordings made by an undercover agent and an informant after an indictment against defendant had been entered; (4) a motion to suppress these same recordings and statements as a violation of the Mutual Legal Assistance Treaty ("M.L.A.T.") between the United States and the Netherlands; and (5) a motion to limit the use of evidence by the Government obtained from the Netherlands solely for "character-building" purposes at sentencing.

By summary order dated July 20, 2005, the Court denied defendant's remaining motions. This Memorandum Order serves to reconfirm those rulings and briefly state the reasons therefor.

By way of background, defendant, a Dutch national, was initially indicted on July 25, 2002 for engaging in a conspiracy to import Methylenedioxymethamphetamine (commonly called

"Ecstasy") in violation of 21 U.S.C. § 963. See *United States v. Rommy*, 02 Cr. 994 (S.D.N.Y.). Thereafter, the Government learned that defendant wasplanning to organize a new drug-smuggling operation.The Government thereupon arranged to have an undercover agent and a confidential informant meet with [*3] defendant in Bermuda, where their conversations were recorded. See *United States v. Rommy*, S1 02 Cr. 994 (S.D.N.Y., 11/18/03), PP4(i)-(j). On November 12, 2003, defendant was arrested in Spain, Thereafter:, a superseding indictment was returned, see id., adding a further object to the conspiracy and a forfeiture allegation based on the evidence from Bermuda. See id. PP3, 5. A second superseding indictment was filed on December 9, 2003 to correct a typographical error. *See United States v. Rommy*, S2 02 Cr. 994 (S.D.N.Y., 12/9/03).

Meanwhile, although extradition proceedings had been commenced against defendant following his arrest in Spain, defendant retained two European attorneys to contest extradition. See Affidavit of Laura de Vreeze, June 7, 2005 ("de Vreeze Aff."), attached as Ex. A to Defendant's Notice of Motion, P3. While the proceedings were still pending, defendant (through his girlfriend Laura de Vreeze) informed the Spanish National Police that defendant wished to speak with DEA representatives. Affidavit of John Fernandez, June 23, 2005 ("Fernandez Aff."), attached as Ex. A to Government Letter, June 24, 2005, P3. In response, on August 26, 2004, DEA Special Agent John Fernandez accompanied by a DEA analyst, a Spanish National Police inspector, and Ms. de Vreeze, went to the Madrid prison where defendant was detained to meet with defendant. Id. PP4-5. Defendant was not read

Miranda warnings and neither of his lawyers was present for the meeting. Id. P5; de Vreeze Aff. P6.

At this meeting, defendant told Special Agent Fernandez that he wanted to provide information to the DEA in hopes of obtaining leniency, to which Fernandez responded that only a judge could grant leniency in sentencing but that any information he provided would be made known to the judge. See Fernandez Aff. P6; Affidavit of Henk Orlando Rommy, June 30, 2005 ("Rommy Aff."), P3. Although Fernandez then offered to stop the meeting if defendant wanted, defendant told Fernandez that he still wanted to provide information and the meeting continued. Fernandez Aff. PP6-7. According to Special Agent Fernandez, the subjects of conversation were wholly of defendant's choosing and the Special Agent asked only clarifying follow-up questions. *Id.* According to defendant, the "agents" asked "many questions" that he would not characterize as "follow-up," including a question about the "kinds of activities" in which a person the defendant was discussing was involved. Rommy Aff. P5. As shown below, however, neither this nor any other difference between the defendant's and the Government's accounts of what occurred is material to the Court's resolution of the motions.

Regarding the first motion (seeking suppression because of the absence [*4] of *Miranda* warnings), no such warnings are required where a defendant, as here, reaches out to initiate the conversations with the agent and volunteers the information. *See Edwards v. Arizona*, 451 U.S. 477, 485, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981); *United States v. Koontz*, 143 F.3d 408, 411 (8th Cir. 1998). Despite submitting two affidavits from Ms de Vreeze and one from himself, defendant has not offered any evidence that calls into question either that defendant voluntarily initiated the meeting with the DEA agents or that he chose the subjects of discussion. *Compare* Fernandez Aff. PP3, 6-7 with Rommy Aff. and de Vreeze Aff. While defendant does claim in conclusory fashion that Special Agent Fernandez's questions were more than mere "follow-up," he provides no specific examples of questions that were not for purposes of clarification. See Rommy Aff. P5; Koontz, 143 F.3d at 411. Accordingly, his first motion must be denied.

Defendant's second motion -- to suppress the Madrid statements for violation of his Sixth Amendment right to counsel -- fails for similar reasons. "Nothing in the Sixth Amendment prevents a suspect charged with a crime [*5] and represented by counsel from voluntarily choosing, on his own, to speak with police in the absence of an attorney." *Michigan v. Harvey*, 494 U.S. 344, 352, 108 L. Ed. 2d 293, 110 S. Ct. 1176 (1990). *See also, e.g., United States v. Stevens*, 83 F.3d 60, 64 (2d Cir. 1996) (per curiam), cert. denied, 519 U.S. 902, 136 L. Ed. 2d 181, 117 S. Ct. 255 (1996). Here, it is uncontested that defendant initiated the meeting with the DEA agents, directed its subject matter, and chose to continue the meeting even after Agent Fernandez offered to halt it. *Compare* Fernandez Aff. PP3, 6-7 with Rommy Aff. and de Vreeze Aff.

Moreover, defendant has never alleged that his statement to the DEA agents was not voluntary or that he was unaware of his right to have his counsel present. In fact, by that time, two lawyers had already been assisting defendant for over eight months in connection with his pending extradition proceedings. See de Vreeze Aff. P3. The only reasonable inference from this evidence is that defendant voluntarily chose to speak with the DEA agents without counsel present, and, therefore, his Constitutional right to counsel was not violated.

In his third motion, defendant seeks to expand [*6] the Sixth Amendment's protections to his conversations with an undercover agent and a confidential informant that occurred in Bermuda after his initial indictment but before he was arrested. There is no support in law or reason for enlarging the shield of the Sixth Amendment in this way. No court has held that the entry of an indictment protects defendants from investigation of new, ongoing criminal activity. *See McNeil v. Wisconsin*, 501 U.S. 171, 175, 115 L. Ed. 2d 158, 111 S. Ct. 2204 (1991) (the right to counsel "cannot be invoked once for all future prosecutions. "); *cf. Texas v. Cobb*, 532 U.S. 162, 172-73, 149 L. Ed. 2d 321, 121 S. Ct. 1335 (2001) (Sixth Amendment protection does carry over to closely related, but uncharged, past offenses). Indeed, where criminal activities do not cease upon filing of an indictment, "it is the duty of the government to attempt to secure evidence thereof regardless of whether any indictment has been returned against any participant in the continuing activities." *Poeta v. United States*, 455 F.2d 117, 122 (2d Cir. 1972). Since the Government's covert investigation in Bermuda related to new criminal activity, there was no Sixth Amendment violation.

As for defendant's [*7] fourth motion, defendant seeks suppression of the recordings of his conversations in Bermuda on the ground that these recordings violate the provision of M.L.A.T. that states that the United States must "execute [its] requests for search and seizure in accordance with [the Netherlands'] laws and practices." *See* Treaty on Mutual Assistance in Criminal Matters, June 12, 1981, U.S.-Neth., 35 U.S.T. 1361, T.I.A.S. No. 10,734 ("Treaty"), Art. 6(1). Defendant asserts that the Bermuda conversations were the fruit of covert investigations in the Netherlands that were conducted without certain warrants, agreements, and prior authorizations that defendant claims were required under Dutch law. However, defendant has no standing to raise these objections because the M.L.A.T. provides that "except where [the M.L.A.T.] specifically sets forth rules for the admissibility of evidence, the provisions of [the M.L.A.T.] shall not give rise to a right on the part of any person to take any action in a criminal proceeding to suppress or exclude any evidence." Id. Art. 18(2). *See United States v. Davis*, 767 F.2d 1025, 1030 (2d Cir.1985).

Defendant's final motion [*8] -- to limit the use of the evidence obtained from the Netherlands to sentencing only is likewise precluded by the aforementioned provision of the M.L.A.T. In addition, defendant's argument lacks a factual basis. Although the M.L.A.T allows the requested state, "in its discretion[, to] deny the request entirely or in part," Treaty Art. 4(2), there is no competent evidence that any limitation was here imposed. Rather, all that defendant can muster is the affidavit of one of his Dutch counsel stating that he (the counsel) was told by an employee of the Dutch Bureau of International Legal Aid that the information provided to the Government by the Netherlands would only be used for "character building." The Dutch counsel then interpreted that to mean that the information could only be used by the judge in sentencing. See Affirmation of Marc Cornelis Johannes Teurlings, June 3, 2005, attached as Ex. B to Notice of Motion, P8. If any such limitation had in fact been imposed, it would have of necessity been reduced to writing. In the absence of such a writing, the interpretation by absent counsel of an oral hearsay statement allegedly made by a Dutch functionary has no probative [*9] weight or effect.

For the foregoing reasons, the Court reconfirms its ruling that defendant's five remaining motions to suppress and/or limit the use of evidence are denied. The parties are reminded that trial of this case will commence promptly at 9:00 a.m. on Monday, September 19, 2005 in Courtroom 14-B, 500 Pearl Street, New York, New York.

SO ORDERED.

JED S. RAKOFF, U.S.D.J.

Dated: New York, New York
July 25, 2005

Treaty on Mutual Assistance in Criminal Matters, June 12, 1981, U.S.-Neth., 35 U.S.T. 1361, T.I.A.S. No. 10,734

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE KINGDOM OF THE NETHERLANDS ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS

The Government of the United States of America and the Government of the Kingdom of the Netherlands, desiring to conclude a Treaty on mutual assistance in criminal matters have agreed as follows:

ARTICLE 1

Obligation to Render Assistance

1. The Contracting Parties undertake to afford each other, upon request and in accordance with the provisions of this Treaty, mutual assistance in criminal investigations and proceedings.

2. Assistance shall include, but not be limited to:

a. locating persons;

b. serving documents;

c. providing records;

d. taking the testimony or statements of persons;

e. producing documents;

f. executing requests for search and seizure; and

g. transferring persons in custody for testimonial purposes.

ARTICLE 2

Locating Persons

The Requested State shall make thorough efforts to ascertain the location of persons specified in the request and believed to be within the Requested State.

ARTICLE 3

Serving Documents

1. The Requested State shall cause service of any legal document transmitted for this purpose by the Requesting State.

2. Any request for the service of a document requiring the appearance of a person before an authority in the Requesting State shall be transmitted a reasonable time before the scheduled appearance.

3. The Requested State shall return as proof of service a dated receipt signed by the person served or a declaration signed by the officer making service, specifying the form and date of service.

ARTICLE 4

Providing Records of Government Offices or Agencies

1. The Requested State shall provide a copy of a publicly available record of a government office or agency, duly authenticated by an appropriate official.

2. The Requested State may provide any record or information in the possession of a government office or agency, but not publicly available, to the same extent and under the same conditions as it would be available to its own law enforcement or judicial

authorities. The Requested State in its discretion may deny the request entirely or in part.

ARTICLE 5

Taking Testimony and Producing Documents in the Requested State

1. A person from whom evidence is sought shall, if necessary, be compelled by subpoena to appear and testify or produce documents, records and articles to the same extent as in investigations or proceedings in the Requested State. Testimonial privileges under the laws of the Requesting State shall not apply in the execution of requests under this Article.

2. On request, the Requested State shall state the date and place of the taking of testimony.

3. At the execution of a request, the Requested State shall permit the presence of an accused, counsel for the accused, and any other interested person specified in the request.

4. The executing authority shall provide any person permitted to be present the opportunity to pose questions for the person whose testimony is sought.

ARTICLE 6

Executing Requests for Search and Seizure

1. The Requested State shall execute requests for search and seizure in accordance with its laws and practices if the subject offense is punishable under the laws of both Contracting Parties by deprivation of liberty for a period exceeding one year, or, if less, is specified in the Annex of this Treaty.

The competent Authorities referred to in Article 14 may agree in writing upon any modifications of the Annex. Such modifications shall take effect on a date to be determined in an exchange of diplomatic notes.

2. An offense shall be deemed punishable under the laws of the Requested State if the acts or omissions alleged, occurring in similar circumstances in the Requested State, would constitute a criminal offense under the laws of that State. For purposes of this paragraph, purely jurisdictional elements of United States Federal offenses, such as the use of the mails or interstate commerce, shall not be considered as essential elements of these offenses.

3. A request to the Kingdom of the Netherlands for the production of documents from private persons shall comply with this Article.

4. A request to the United States for a search and seizure shall be accompanied by a statement made under oath before, or by a judge in the Kingdom of the Netherlands, which shall establish good cause to believe that an offense has taken place or is about to take place and that evidence of the offense is to be found on the persons or the premises to be searched, and shall provide a precise description of the person or premises to be searched. Such a statement shall be considered in the United States in lieu of an affidavit sworn before a United States judicial officer.

5. Documents produced under this Article shall be duly authenticated as specified in the request, and a record shall be made of every transfer of other articles or evidence seized. Such records of transfer shall be

admitted as evidence of the truth of the facts they assert.

ARTICLE 7

Transferring Persons in Custody to the Requesting State

1. A person in custody needed as a witness or for purposes of confrontation before an authority in the Requesting State shall be transported to the Requesting State if:

   a. the person in custody consents:

   b. no substantial extention of that person's custody is anticipated; and

   c. the Requested State has no reason to deny the transfer.

2. The Requested State may postpone execution of the request for as long as the presence of the person is necessary for an investigation or proceeding in the Requested State.

3. The Requesting State shall have authority and be obligated to keep the person in custody unless the Requested State has ordered release.

4. The Requesting State shall return a person not released under paragraph 3 to the custody of the Requested State as soon as circumstances permit or as otherwise agreed. The Requesting State shall not decline to return a person transferred because such person is a national of that State.

ARTICLE 8

Transferring Persons in Custody to the Requested State

1. When the Requesting State requires the transfer to the other State of a person in custody for purposes of confrontation, the request shall so state.

2. The Requested State shall hold the person in custody, unless the Requesting State has ordered release.

3. The Requested State shall return a person not released under paragraph 2 to the custody of the Requesting State as soon as circumstances permit or as otherwise agreed. The Requested State shall not decline to return the person transferred because such person is a national of that State.

ARTICLE 9

Safe Conduct

1. A person appearing before an authority in either State pursuant to this Treaty shall not be subject to suit, or be detained or subjected to any other restriction of personal liberty, with respect to any act or conviction which preceded departure, except as provided in Articles 7 and 8 and in the following paragraph.

2. A person, of whatever nationality, summoned before the judicial authorities of the Requesting State as an accused, shall not be prosecuted or subjected to any restriction of personal liberty for acts or convictions prior to departure from the Requested State and not specified in the summons.

3. Safe conduct provided in this Article shall cease if, ten days after the person appearing has been notified that his or her presence is no longer required,

that person has not left the Requesting State or, having left, has returned.

4. A person appearing as a witness in the Requesting State may refuse to testify when that person, because of occupation, has an obligation or right to do so under the laws of the Requested State and the testimony required relates to protected information. The Requesting State shall respect the obligation or right when the Competent Authority of the Requested State verifies that such obligation or right exists.

ARTICLE 10

Limitations on Compliance

1. The Requested State may deny a request to the extent that:

> a. execution of the request would prejudice the security or other essential public interests of the Requested State;
>
> b. the request relates to a matter considered a political offense by the Requested State;
>
> c. the request relates to the prosecution of a person who is immune from prosecution for the offense for which assistance is requested, by reason of the laws of the Requested State relating to prior jeopardy; or
>
> d. the request does not comply with the provisions of this Treaty.

2. The Requested State may postpone execution of a request or grant it subject to conditions, if execution

would interfere with an ongoing investigation or legal proceeding in the Requested State.

3. The Requested State shall immediately inform the Requesting State of the reason for denying or postponing the execution of a request.

ARTICLE 11

Protecting Confidentiality and Restricting Use

1. When necessary, the Requested State may require that evidence and information provided under this Treaty and information derived therefrom be kept confidential in accordance with stated conditions, except to the extent that disclosure is necessary as evidence in a public proceeding.

2. The Requesting State shall not use any evidence obtained under this Treaty, nor any information derived therefrom, for purposes other than those stated in the request, without the prior consent of the Requested State.

ARTICLE 12

Executing Requests

1. The Competent Authority of the Requested State shall promptly comply with the request or, when appropriate, transmit it for execution to the authority having jurisdiction.

2. Requests shall be executed according to the domestic law and procedures of the Requested State except to the extent that this Treaty provides otherwise. Procedures specified in the request, even if unfamiliar to the Requested State, shall be followed except to the extent specifically prohibited by the laws of the Requested State.

ARTICLE 13

Contents of Requests

1. A request for assistance shall indicate:

a. the name of the authority conducting the investigation or proceeding to which the request relates;

b. the subject matter and nature of the investigation or proceeding;

c. a description of the evidence or information sought or the acts to be performed; and

d. the purpose for which the evidence, information or action is sought.

2. To the extent necessary and possible, a request shall include:

a. available information on the identity and whereabouts of a person to be located;

b. the identity and location of a person to be served, that person's relationship to the proceeding and the manner in which service is to be made;

c. the identity and location of persons from whom evidence is sought;

d. a description of the manner in which any testimony is to be taken and recorded;

e. a list of questions to be answered;

f. a precise description of the place to be searched and the objects to be seized;

g. a description of any particular procedure to be followed in executing the request; and

h. information as to the allowances and expenses to which a person appearing in the Requesting State will be entitled.

ARTICLE 14

Competent Authorities

All requests for assistance shall be made and executed through a Competent Authority for each Contracting Party. The Competent Authorities of the two States shall communicate directly with each other for the purpose of carrying out the provisions of this Treaty. For the United States of America, the Competent Authority shall be the Attorney General or that person's designee. For the Kingdom of the Netherlands, the Competent Authority shall be the Minister of Justice in the Netherlands or the Minister of Justice in the Netherlands Antilles or their designees.

ARTICLE 15

Return of Completed Requests

1. Upon completion of a request the Requested State shall, unless otherwise agreed, return the original request together with all information and evidence obtained, indicating place and time of execution, to the Requesting State.

2. To the extent possible, all documents and records to be furnished pursuant to a request under this Treaty shall be complete and in unedited form. Upon application of the Requesting State, the

Requested State shall make every effort to furnish original documents and records.

ARTICLE 16

Return of Documents, Records or Articles of Evidence

The Requesting State shall return any documents, records or articles of evidence furnished in execution of requests as soon as possible unless the Requested State waives their return.

ARTICLE 17

Costs and Translations

1. The Requested State shall render assistance without cost to the Requesting State except for fees of private experts specified in the request.

2. The Requesting State shall bear all expenses related to the transfer under Articles 7 and 8 of a person in custody.

3. Requests shall be provided in both Dutch and English. Translation of documents provided pursuant to requests is incumbent on the Requesting State.

ARTICLE 18

Other Treaties and Domestic Laws

1. Assistance and procedures provided by this Treaty shall be without prejudice to, and shall not prevent or restrict, any assistance or procedure available under other international conventions or arrangements or under the domestic laws of the Contracting Parties.

2. Except where this Treaty specifically sets forth rules for the admissibility of evidence, the provisions of this Treaty shall not give rise to a right on the part of any person to take any action in a criminal proceeding to suppress or exclude any evidence. This Treaty does not expand or limit rights to judicial review otherwise available under domestic law.

3. No provision governing extradition of persons, whether of domestic law or treaty, shall apply to the transfer of persons under Articles 7 and 8 or to appearance under paragraph 2 of Article 9.

ARTICLE 19

Entry into Force

1. This Treaty shall be subject to ratification; the instruments of ratification shall be exchanged at Washington, D.C., as soon as possible.

2. This Treaty shall enter into force 30 days after the exchange of the instruments of ratification. This Treaty shall apply both with respect to acts committed before or after its entry into force.

ARTICLE 20

Scope of Application

1. As regards the Kingdom of the Netherlands, the present Treaty shall apply to the territory of the Kingdom in Europe and to the Netherlands Antilles, unless the instrument of ratification of the Government of the Kingdom of the Netherlands, referred to in Article 19, shall otherwise provide.

2. The Kingdom of the Netherlands reserves the right to declare at the time of ratification that this

Treaty shall not apply to requests for assistance relating to fiscal offenses addressed to the Netherlands Antilles. This reservation may at any time be wholly or partially withdrawn through an exchange of diplomatic notes between the Contracting Parties.

ARTICLE 21

Denunciation

1. Either Contracting Party may terminate this Treaty at any time by giving notice to the other Party and the termination shall be effective six months after the date of receipt of such notice.

2. Termination of this Treaty by the Government of the Kingdom of the Netherlands may be limited to one of the constituent parts of the Kingdom.

Done at The Hague on 12 June 1981 in two copies in the English and Dutch languages, each version being equally authentic.

For the Government of the United States of America:

THOMAS J. DUNNIGAN.

For the Government of the Kingdom of the Netherlands:

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EMBASSY OF THE

UNITED STATES OF AMERICA,

The Hague, June 12, 1981.